



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

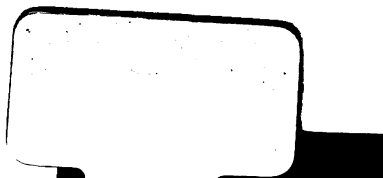
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



*Stanford
Law Library*



Given by
Title Insurance
and
Trust Company
Foundation



DL
ACT
AAZ

THE
A C T
FOR
The Enclosure of Commons
IN
ENGLAND AND WALES :

WITH A
TREATISE ON THE LAW OF RIGHTS OF COMMONS,
IN REFERENCE TO THIS ACT :

AND
FORMS AS SETTLED BY THE COMMISSIONERS,
ETC. ETC.

BY
GEORGE WINGROVE COOKE, ESQ.
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON :
OWEN RICHARDS, LAW BOOKSELLER, &c.
194. FLEET STREET.
1846.

LONDON:
Printed by A. SPORTISWOODE,
New-Street-Square.

P R E F A C E.

THIS little volume has been arranged by the Editor solely with a view to the convenience of those who may be engaged in carrying into effect the statute of the last Session for facilitating the Enclosure of Waste Lands.

The introductory Treatise is necessarily but meagre, when compared with the extent and importance of the branch of law of which it treats; and it was thought advisable to insert in it many rudimental matters which would have been omitted had it been addressed solely to the Profession. It is hoped, however, that it will be found a summary of the law sufficient for the ordinary necessities of parties enclosing under this Act.

All the forms which have hitherto been issued by the Enclosure Commissioners will be found in the Appendix, and the Editor has been at some

pains to collect from parties who have commenced Enclosures under the new Act such opinions of the Commissioners upon the interpretation of the several clauses as have hitherto been intimated to those who have applied to them.

9. *Inner Temple Lane,*
Dec. 24. 1845.

C O N T E N T S.

CHAPTER I.

	PAGE
Of Rights of Common, and the several Kinds of Com-	
mon generally - - - - -	1
SECT. II. — Of the several Kinds of Commons -	6

CHAPTER II.

Common of Pasture - - - - -	9
SECT. I.—Appendant - - - - -	9
SECT. II.—Appurtenant - - - - -	15
SECT. III.—In Gross - - - - -	23
SECT. IV. Pur Cause de Vicinage - - - - -	25

CHAPTER III.

Of Commons other than Common of Pasture. — Es-	
tovers. — Turbary. — Common in the Soil. —	
Piscary - - - - -	28

CHAPTER IV.

Of Wastes - - - - -	35
SECT. I.—Common Lands—The Manorial Waste.	
Woodlands. Stinted Pastures. Forests -	35
SECT. II.—Commonable Lands — Lammas Lands	
—Shack - - - - -	40

CHAPTER V.

	PAGE
On the Creation, Alienation, and Extinguishment of Rights of Common	46

CHAPTER VI.

Of the Rights of Lords of the Soil and of Commoners	51
SECT. I. — Rights of the Lord — to Approve — to Common — to Mines	51
SECT. II. — Rights of the Commoner — Dependent upon Custom or Prescription. What Customs are good	57

CHAPTER VII.

Of Enclosure	68
SECT. I. — By the Lord	68
SECT. II. — By Agreement between the Lord and the Commoners	68
SECT. III. — By Act of Parliament	69
SECT. IV. — By Encroachments	73

CHAPTER VIII.

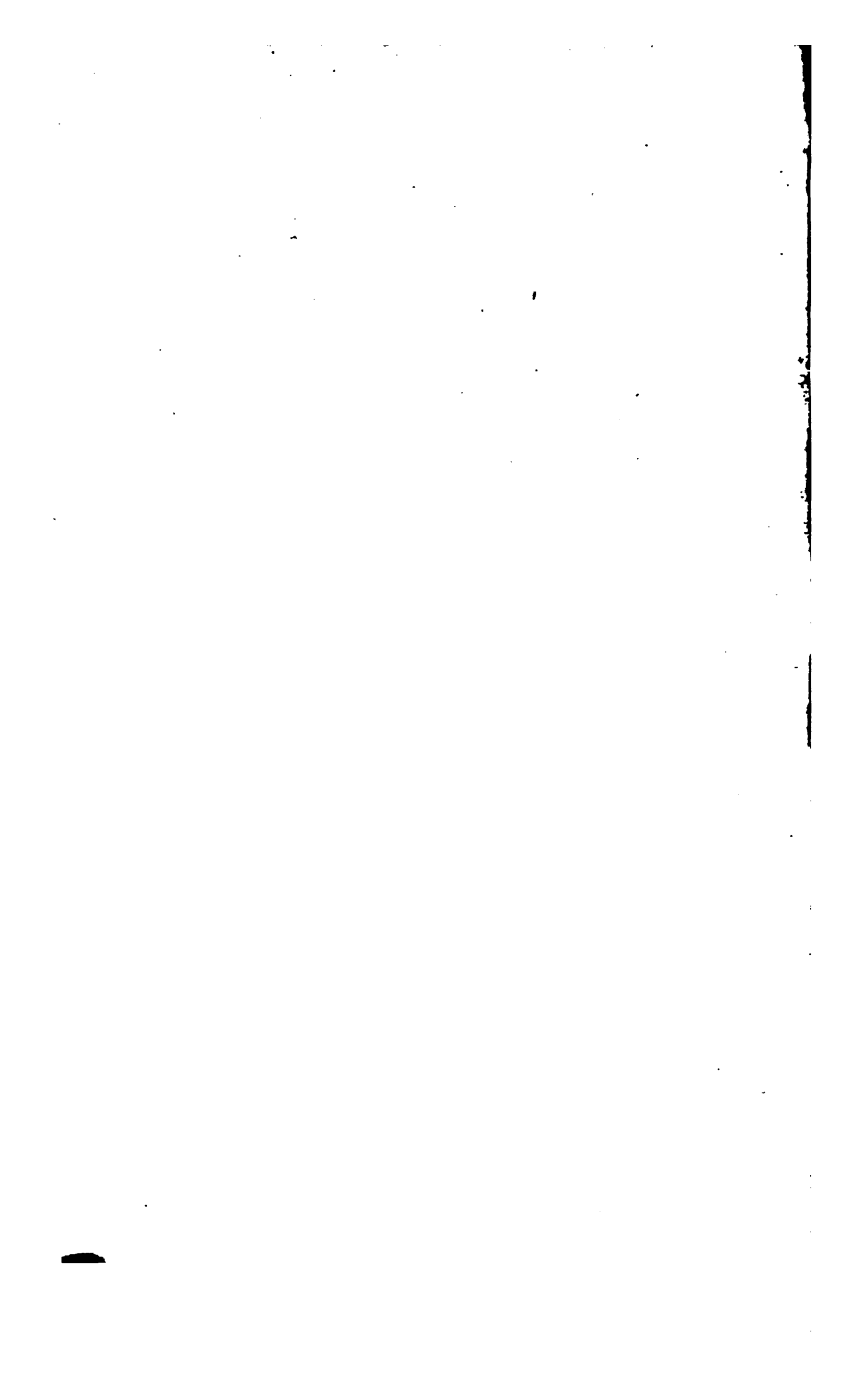
Of the Evidence in Claims of Rights of Common	76
---	----

The Act of 8 & 9 Vict. c. 118., to facilitate the Enclosure and Improvement of Commons and Lands held in common, the Exchange of Lands, and the Division of intermixed Lands; to provide Remedies for defective or incomplete Executions, and for the Non-execution of the Powers of General and Local Enclosure Acts; and to provide for the Revival of such Powers in certain Cases. [8th August, 1845]

89

APPENDIX.

	PAGE
The Act of 2 & 3 Wm. 4. c. 71., for shortening the Time of Prescription in certain Cases. [1st August, 1832] - - - - -	289
Form of Application for Enclosure - - - - -	294
----- for Exchange - - - - -	299
----- for Division of intermixed Lands	301
----- under 8 & 9 Vict. c. 118. s. 121. -	302
Notice of Meeting by Assistant Enclosure Commis- sioner - - - - -	302
Forms of Claims - - - - -	303
Claim of Right of Common of Pasture over Common Lands - - - - -	304
----- over common- able Lands - - - - -	304
Claim of Common of Pasture under 2 & 3 Wm. 4. c. 71.	306



A TREATISE

ON THE

LAW OF RIGHTS OF COMMON.

CHAPTER I.

OF RIGHTS OF COMMON, AND THE SEVERAL KINDS OF COMMON GENERALLY.

SEVERAL of the writers upon the Law of Common Rights have exercised much industry in attempting to trace the origin of their subject; and some think they find it in the Agrarian Law of the Roman republic, and in the Licinian and other laws which were enacted to regulate the right so given. In truth, however, the right of Common is indebted for its origin to no municipal law. It has always been co-existent with the disproportion of land to population; it grows restricted as that disproportion decreases; and it must every where disappear when that disproportion ceases.* We

* Sixty years ago Archdeacon Paley pointed out three capital measures by which the legislature might encourage

might expect to find contests as to rights of common first occurring in a country where herb-

agriculture. These three measures were, 1. The enclosure and partition of wastes; 2. The enfranchisement of copyholds; and 3. The commutation of tithes. The passage of his Moral Philosophy, in which this clear-headed man points to the three great agricultural reforms of the present age, is so remarkable, that I venture to quote it at length:—
“There exists in this country conditions of tenure which condemn the land itself to perpetual sterility. Of this kind is the right of common, which precludes each proprietor from the improvement, or even the convenient occupation, of his estate, without (what seldom can be obtained) the consent of many others. This tenure is also usually embarrassed by the interference of manorial claims, under which it often happens that the surface belongs to one owner and the soil to another; so that neither owner can stir a clod without the concurrence of his partner in the property. In many manors the tenant is restrained from granting leases beyond a short term of years, which render every plan of solid improvement impracticable. In these cases the owner wants what the first rule of rational policy requires, ‘sufficient power over the soil for its perfect cultivation.’ This power ought to be extended to him by some easy and general law of enfranchisement, partition, and enclosure, which, though compulsory upon the lord or the rest of the tenants, whilst it has in view the melioration of the soil, and tenders an equitable compensation for every right that it takes away, is neither more arbitrary nor more dangerous to the stability of property than that which is done in the construction of roads, bridges, embankments, navigable canals, and, indeed, in almost every public work, in which private owners of land are obliged to accept that price for their property which an indifferent jury may award. It may here, however, be proper to observe, that although the enclosure of wastes and pastures be generally beneficial to population, yet the enclosure of lands in tillage, in order to convert them into pastures, is as generally hurtful.

“But, secondly, agriculture is discouraged by every constitution of landed property, which lets in those who have no concern in the improvement to a participation of the

age was scanty; and accordingly we discern the first rude natural contest upon the subject of surcharging common lands in the disputes which arose between the herdsmen of Abraham and Lot.*

profit. This objection is applicable to all such customs of manors as subject the proprietor, upon the death of the lord or tenant, or the alienation of the estate, to a fine apportioned to the improved value of the land; but of all institutions which are in this way adverse to cultivation and improvement, none is so noxious as that of tithes. A claimant here enters into the produce who contributed no assistance whatever to the production. When years, perhaps, of care and toil have matured an improvement,—when the husbandman sees new crops ripening through his skill and industry, the moment he is ready to put his sickle to the grain, he finds himself compelled to divide his harvest with a stranger. Tithes are a tax not only upon industry, but upon that industry which feeds mankind, upon that species of exertion which it is the aim of all wise laws to cherish and promote, and to uphold and excite; which composes, as we have seen, the main benefit that the community receives from the whole system of trade and the success of commerce. And, together with the more general inconvenience that attends the exaction of tithes, there is this additional evil in the mode, at least according to which they are collected at present, that they operate as a bounty upon pasturage. The burden of the tax falls with its chief, if not with its whole weight, upon tillage, that is to say, upon that precise mode of cultivation which, as hath been shown above, it is the business of the state to relieve and remunerate in preference to every other. No measure of such extensive concern appears to me so practicable, nor any single alteration so beneficial, as the conversion of tithes into corn rents. This commutation I am convinced might be so adjusted as to secure to the titheholder a complete and perpetual equivalent for his interest, and to leave to industry its full operation and entire reward.”—*Paley's Moral Philosophy*, c. xi. s. 6.

* “And the land was not able to bear them, that they might dwell together: for their substance was great, so that

In our own country we have neither record nor tradition anterior to the existence of a property in land. Without entering upon the question of the origin of feuds and of manors, we may sufficiently understand, that since the time when the history of this island begins, a title has never been wanting in some person to every rood of land in Britain. There was every where some lord of the district, whose wealth was in proportion to the number of his retainers rather than to the extent of his lands. So long as the population was scanty, land was too abundant to be cultivated for pasture; after as much as the population could till had been parcelled out, with a reservation of services, there was still a large remaining waste, upon which the cattle used in tillage might pasture.* The waste was the lord's, but its extent was beyond his power of occupation, and the tenants of his arable lands used it until he chose to reclaim it. Among a people whose passion for independence entered into all their institutions, that which was originally a right as against strangers soon grew into a right even against the lord himself. The protection and limitation of this right† were probably among the earliest of the

they could not dwell together. And there was a strife between the herdsmen of Abram's cattle and the herdsmen of Lot's cattle."—Gen. xiii. 6.

* See Potter v. Sir H. North, Ventr. 395.

† Qui pecora sua in communia alterius presidii seu villæ pascua immiserit, &c.—Speculum Saxon. l. ii.

provisions of that traditionary code which we call our common law.

However this may be, it is certain that rights of common were known to our oldest text writers nearly as they are known to us at this day. Bracton, one of the earliest and most venerated of these, wrote upon this subject in the 13th century. He has a chapter on rights of common, which would not be out of place in a modern treatise; and even Bracton is compelled to cite anterior writers, and expresses himself frequently in terms drawn from the civilians.

A right of common has been defined to be a right which one or more persons may have to take or use some portion of that which another person's soil naturally produces.

Rights of common are either appendant, appurtenant, in gross, or *pur cause de vicinage*.

1. Right of common appendant is a right customarily annexed to the possession of arable land, by which the owner thereof is entitled to the use of the manorial waste for such purposes as are necessary to the maintenance of his husbandry.

2. Right of common appurtenant is a right depending upon a grant or upon a prescription, which supposes a grant annexing to particular lands a right of user of a particular waste.

3. Right of common in gross is a right depending upon a grant or prescription, entitling the

possessor to some user of a particular waste, without reference to any tenure of land.

4. Right of common *pur cause de vicinage* is the right which the commoners of adjoining wastes have of suffering their cattle to stray over each other's boundary.*

In these definitions it must be understood, that the word waste is intended to include all lands which are the subject of a right of common.

SECTION II.

Of the several Kinds of Commons.

Having thus stated the several kinds of rights of common, we now proceed to consider the several kinds of subject-matters of that right.†

* Bac. Abr. tit. Common. Cruise Dig. Co. Lit. 122 a.

† It has been the custom of writers upon this department of our law to confuse their subject by a faulty division. Thus Bacon, Cruise, and Woolrich, all treat of "the several kinds of common," first as common appendant, appurtenant, in gross, and by vicinage, and then as common of pasture, turtary, piscary, and estovers. In truth, however, the first division applies only to rights of common, and the second only to the subject-matter of that right. It is very important to keep this distinction in view. Some writers have erred still more strangely, in making the division of the right of common a subdivision of the common of pasture; an illogical division, which surely might have struck them

We have already seen that the subject-matter of a right of common is generally all things which the soil naturally produces.

These productions have been divided by our law writers into four classes, and they treat of Common of Pasture, Common of Piscary, Common of Turbary, and Estovers.

1. Common of pasture is a right of feeding one's beasts upon another's land.

2. Common of piscary is a right of fishing in another's water.

3. Common of turbary is a right of digging turves from another's soil.

4. Common of estovers is a right of taking from another's land the wood necessary for the sustenance of the commoner's house or agriculture. The word is derived from the Norman verb *estoffer*, to furnish; but the right itself was known in England before the time of the Normans by the Saxon word *bote*. Thus house-bote is the wood necessary to repair the house; the house-fire-bote is the wood sufficient to burn in the house; plough-bote and cart-bote are the wood necessary to make and repair implements of agriculture; hay-bote is the wood necessary to the making or repairing of hays, i. e. hedges or fences; but all these are included under the general word estovers.

when they came to treat of the distinction between estovers appendant and estovers appurtenant.

8 OF THE SEVERAL KINDS OF COMMON.

To these four a fifth has sometimes been added, viz., a right of taking sand, gravel, stone, and even minerals from another's soil.*

We shall treat of these several kinds of commons separately, according to their order.

* Co. Lit. 41 b. 122 a.

CHAPTER II.

COMMON OF PASTURE.

SECT. I. *Appendant.* — II. *Appurtenant.* — III. *In Gross.*
— IV. *Pur Cause de Vicinage.*

COMMON of Pasture is enjoyed either as an appendancy of the ancient arable land of the manor, or as an appurtenancy annexed to certain lands by the owner of the soil of the common, or as an integral property vested in an individual by a grant from the lord.

I. *Common of Pasture Appendant* to ancient arable land must have existed beyond the time of legal memory*, that is, before the reign of Richard the First. It is, however, unnecessary now to prove this early origin, as we shall show hereafter when we come to speak of the proof requisite to establish a right of common.

The common of pasture appendant to ancient arable is confined to such cattle as serve for the maintenance of the plough, as horses and oxen, to plough the land, and sheep and kine to compester (that is, to manure) it.†

* Co. Lit. 122 a.

† Ibid.

The number of such cattle which may be turned upon the common was originally limited to the number required in the tillage of the farm. This limitation, however, was probably found difficult to be applied, as the number necessary to till would vary in different years according to the circumstances of the tillage. The Courts therefore adopted a rule more certain in its application, namely, that a right of common of pasture appendant gives a right to turn upon the common so many commonable cattle as the land to which the right is appendant will maintain by its produce through the winter. So many as the land will maintain during the winter are said to be *levant* and *couchant* upon that land.*

The cases as to cattle *levant* and *couchant* are very numerous. It is submitted, however, that none of the decisions go to abridge the original right, which was measured by the number necessary to plough and compester, although they, in many cases, undoubtedly enlarge that right by admitting to common all cattle which the land will winter, but which are not necessary to its tillage.

Cattle *levant* and *couchant*, commonable in respect of right of common appendant, may therefore be defined to be such cattle as the land can

* *Scholes v. Hargreaves*, 5 T. R. 47.

maintain during the winter by its produce, or requires to plough and compester it.*

The origin of this double definition of levancy and couchancy probably was, that the number requisite to plough and compester was the limit to common appendant, and the capacity of wintering was the limit to common appurtenant. As we have already said, it would appear that the Courts have adopted the latter admeasurement as the most liberal and convenient in both cases. They have never, however, denied the right of common appendant to be admeasured by its original standard.

The cattle turned upon the common by virtue of the common right appendant must be the cattle which plough and compester the land to which the right is appendant.† The commoner cannot

* *Patricke v. Lowre*, 2 Brownl. 101.; *Smith v. Bonsall*, Goulds. 117.; *Cole v. Foxman*, Noy, R. 30.; *Leech v. Widsley*, 1 Ventr. 54., Willes, 231.; *Scholes v. Hargreaves*, 5 T. R. 47.; *Benson v. Chester*, 8 T. R. 396.; *Cheesman v. Hardman*, 1 B. & A. 711; *Whitelocke v. Hutchinson*, 2 M. & Rob. 205. "The rule now is," said Mr. Baron *Parke* in the case last cited, "that such cattle only are to be holden *levant* and *couchant* upon the enclosed lands as that land will keep during the winter. It has been argued that the rule includes such as the land will keep during the whole or any part of the year, but that is not so. The real question is, has this defendant turned on more cattle on the common than the winter entage of his ancient tenement, together with the hay and produce obtained from it during the summer, is capable of producing." In this case, however, the right was claimed as appurtenant.

† 45 E. 3. 35.

agist the cattle of a stranger for hire * ; that is to say, he cannot rent his right. But if the commoner has no beasts of his own, but borrows those of a stranger, for the purpose of ploughing or compestering his old enclosure, he then has a special property in such cattle sufficient to entitle him to turn them on the common.†

In *Rumsey v. Rawson*, the plaintiff in replevin prescribed for common as belonging to the glebe, and stated that the beasts in question were levant and couchant upon the glebe, and that he put them upon the glebe by the licence of the parson. After a verdict for the plaintiff, it was moved in arrest of judgment that licence cannot be given by a commoner to put the cattle of a stranger upon his common; and the Court held, that had this objection been taken at the proper time, that is, on demurrer, it would have been fatal. After verdict, however, they would assume that the cattle were procured by the parson to compester his land.‡

Common appendant is limited to such cattle as are useful in agriculture. Hogs, goats, geese, or such like, are not commonable by virtue of a right of common appendant.§

* 22 Ass. pl. 84., and 11 H. 6. c. 22.

† *Ubi sup.*, and *Manneton v. Trevillian*, 2 Show. 328.; *Skin*. 137. F. N. B. 180. B.

‡ 1 Ventr. 18. 25., 2 Keb. 410. 493. S. C. *Tho. Raym.* 171.

§ 25 Ass. pl. 8., *Finch*, L. 56.; *Standred v. Shoreditch*, *Cro. Jac.* 580.

The land to which this right is appendant is assumed to have been originally arable. The law, however, will intend that all land which has immemorially had common appendant to it was originally arable*, whatever may be its present state of cultivation.†

Common of pasture, however, can only be appendant to land. Where common has been held to be appendant to a messuage or to a cottage, it appears to have been upon the ground that a messuage ‡ means not only a dwelling-house, but also the land attached to it, and that a cottage § must necessarily have had (when this case was decided) at least four acres of land appended to it.||

* Tyringham's case, 4 Rep. 37. This intendment may, indeed, be excluded by the terms of the pleadings. Thus, if a man plead that he is seised of a house, land, meadow, and pasture, and that he and all those whose estate he has have been used from time whereof the memory of man runneth not to the contrary to have common of pasture for oxen, cows, and heifers, levant and couchant, upon the said house, land, meadow, and pasture, in 100 acres of land, whereof one A. B. was seised in fee to the said house, land, meadow, and pasture appertaining, then the Court resolved that the common was appurtenant, and not appendant, because the prescription was to have common appendant from time whereof, &c. to a house, meadow, and pasture, as well as to arable land; by which it appeared that there had been a house, meadow, and pasture, from time immemorial. But it was against the nature of common appendant to be appendant to a meadow or pasture.

† North v. Cox, 1 Lev. 253; Scholes v. Hargreave, 5 T. R. 49.

‡ 5 T. R. 46.; Bunn v. Channen, 5 Taunt. 244.

§ Emerton v. Selby, 2 Lord Raym. 1015.

|| Under the provisions of 31 Eliz., repealed by 15 Geo. 3. c. 32.

As this is a right attached to the land, and not to the person, all persons are entitled to exercise the right who are capable of holding the land. There are some cases upon this point, but it seems sufficient to refer to them.*

Common appendant often has a very close resemblance to a common of vicinage, and indeed it was said by *Littleton J.*, that a common of vicinage is but a common appendant. This dictum, however, has not been recognised, and it is well settled now that there are several distinctions between the two—distinctions which we shall set forth hereafter, when we come to treat of common of vicinage.

The case put by *Lawrence J.*, in *Hollinshed v. Walton* †, is by no means uncommon in practice. "It might happen," said his lordship, "that the freeholder claimed common appendant in three adjacent vills under the same lord, and it might happen that other tenants of the lord had only common in one of the vills." But although the freeholder in such case would common over all three vills, and upon their enclosure would be entitled to an allotment from each, his right would be a right of common appendant.

"There can be no doubt," said Lord *Ellen-*

* *White v. Sayer*, Palm. 211.; 2 Brownl. 298.; Sir W. Jones, 282.; 2 Alk. 189.; 2 Saund. 1.; 2 Lev. 246.; Vaugh. 190.

† 7 East, 485.

borough C. J., in the same case, "that a man may have two distinct substantial grants of right of common over different wastes from different lords in respect of the same tenement. It may be advantageous to him to change his pasture from time to time, for his cattle, levant and couchant, upon his tenement, and immemorial usage is evidence of such distinct grants."*

Such cases are in fact very frequent in some parts of the country, where the commoners of A. have common over wastes A. and B., but the commoners of B. are confined to waste B. The right of the commoners of A. over the waste of B. is frequently, but erroneously, spoken of as a right of common by vicinage. In truth, the commoners of A., in the case put, have a right of common appendant over the wastes of A. and B.

II. *Common of Pasture Appurtenant*.—A right of common of pasture appurtenant is a right appertaining to certain lands, by which the owner of these lands feeds cattle on the soil of another person.

This right differs from the right of common appendant, in that it does not arise of common right, and is no general manorial privilege supposed to have been conferred by all lords upon all tenants having arable land. It is assumed by the law to have been created by grant from the owner of the soil, and is therefore almost as unfettered

* And see *Barwich v. Matthews*, 5 Taunt. 365., 1 Marsh. 50.

in its character as would be the power of the grantor.

It also differs from the right of common appendant in all those incidents which are occasioned by the origin of common appendant in the connection between the arable land of the manor and the waste. This right of common may therefore be appurtenant to lands situate in another lordship to that in which the waste is situated.* Common appurtenant is not confined to cattle used to plough and compester: but, if the prescription should so run, it may be for hogs, goats, geese, and all other kinds of animals which may be sustained upon the common.†

In all these cases the prescription presumes an ancient grant, and the usage under the prescription evidences the terms of the grant. As however this species of right of common may have been created by grant since the time of legal memory, cases have not been infrequent in which the actual grant has been produced, and the Courts have had to read the rights of the commoners in the terms of the instrument.

In one of these cases it was held‡, that a grant of common for all manner of cattle included only commonable cattle, and in *Smith v. Feverell*§, where defendant pleaded a licence from the lord to put cattle into the waste, *North C. J.* said,

* Cro. Car. 482.

‡ 9 H. 6. c. 36., Perk. 48.

† Co. Lit. 122 a.

§ 2 Mod. 7.

that the licence being general to put in beasts, it should be intended only of commonable cattle, not of hogs, but that it would be otherwise if the licence had been for a particular time.

When, however, the right is claimed by prescription, and the user under the prescription has included cattle not commonable under rights appendant, there appears to be no doubt that such user will be uphelden by the Courts.

Common appurtenant need not be appurtenant to the ancient enclosures or arable lands of the manor in which the waste is situated. The land in respect of which the right accrues may be of any description and in any situation.*

A right of common appurtenant may be for a certain limited number of cattle, and it would appear that when this number is once certainly ascertained, the right may be attached to a dwelling-house or to a cottage without land. Thus it has been said that the possession of a cottage in Lincolnshire gave a right of common appurtenant for a thousand sheep, and the prescription was supposed to have had good origin in a grant for the encouragement of habitation in a fen country. †

* *Sacherville v. Porter*, Cro. Car. 482. ; 2 Black. Com. 34.

† The reason is not a very good one. No person less ignorant of all rural things than our lawyers and judges of former days usually were, would ever have imagined that the power of turning out sheep, to rot, in a fen country, would be an encouragement of habitation. It was probably

The right of common for a number certain may be appurtenant also to a manor * without land.

In fact, this right when so limited appears to lose nearly all necessity of appurtenancy to land. It has been said that it may even be severed, and the appurtenancy destroyed. † It may certainly be appurtenant to an office, as to a burgager in a borough ‡, or even to an inhabitant of a vill. § It has even been said that a man may prescribe to have this right by reason of his person ||, in which last instance we see the right of common appurtenant becoming a simple right of common in gross.

The distinction thus made between a right of common for a limited and for an *unlimited* number, is occasioned by a principle which pervades the whole of this division of our law, that no person shall have so indefinite a right to part, as to enable him to possess himself of the whole.

The ancient remedy for surcharge of a com-

upon some part of the wolds of Lincolnshire, and not in the fens, that the prescription was found. The absence of agricultural knowledge in our courts of law will explain the origin of many old and otherwise inexplicable decisions upon rights of common.

* *Day v. Spooner*, 4 Vin. Ab. 591.; *Musgrave v. Cave*, Willes, 319.; *Stamford v. Burgess*, Shep. Abr. 381.

† *Bunn v. Channen*, 5 Taunt. 244.; but see *contra*, *Smith & Jerdon v. Milward*, 3 Doug. 30.

‡ *Miller v. Walker*, 1 Sid. 462.

§ 1 Saund. 343., Cro. Eliz. 363.; *Weekly v. Wildman*, 1 Lord Raym., 406.

|| 15 E. 4. c. 33.

mon, was a writ of admeasurement of pasture, under which a sheriff's jury decided what and how many cattle each commoner might turn upon the waste, and the rule they adopted was to examine how many cattle might be levant and couchant upon each tenement.

After this admeasurement, any future surcharge cattle were forfeited to the king.

The old writers * say, that all commons appendant, appurtenant, or in gross for a number certain, may be admeasured. Lord *Coke* was of opinion that the writ did not extend to commons in gross †: but it is unnecessary to insist upon this point, since the writ of admeasurement has long been superseded in practice by the more expeditious and summary redress of an action of trespass, or on the case. It is mentioned here only to show how ancient was the limitation of levancy and couchancy upon rights of common appendant and appurtenant, how uniformly the Courts have insisted upon this limitation, and how closely it is interwoven with the remedies, which we may suppose to be almost coeval with the right.

Thus we see that the nature of appurtenancy ceases to be important when the number is certain; it is only regarded when the appurtenancy is necessary in order to the admeasurement of the right.

* Bract. 229., Flet. 262., Brit. 148.

† 2 Inst. 86.

When the right is limited by no specific number, it is limited by levancy and couchancy—unless it be a right in gross, of which we shall speak hereafter.

Any user of common claimed as appurtenant, and not limited in number, and not capable of being limited by levancy and couchancy, is not the exercise of a right, but the doing that which cannot possibly be other than a wrong.

The cases are not only consentient upon the point that a general claim of an unlimited right of common is a claim of a void prescription *, but they have refused to recognise such user, even when granted by deed. Thus in *Benson v. Chester* †, the common was conveyed to trustees, in trust to allow the commoners such user of the common as they had been accustomed to have; the Court, however, here held, that such user must be taken to mean a legal user, and that a claim unlimited by levancy and couchancy could not be supported. In a very recent case *Sir L. Shadwell, V. C.*, sanctioned the same doctrine. ‡

* “ Si home clayme common per prescription pur tous avers commonable en le terre d’un autre come pertenant al un tenement, ceo est un void prescription, car home ne poet aver common sans number appurtenant al terre : et quant il clayme le common pur tous avers commonable, et ne dit pur avers levant et couchant sur le tenement, ceo serra intend destre common sans number selonque les parolls, car la nest aucun chose a limiter ceo quant il ne dit pur avers levant et couchant.”—1 Rol. Abr. 398. pl. 3.

† 8 T. R. 396.

‡ *Ivatt v. Mann*, 4 Scott, N. R. 363.

The propriety of these decisions, and their absolute necessity, as a point of public policy, can admit of little question. They are only insisted upon here, because so many instances are to be found throughout the kingdom in which they have been for ages disregarded, and in which an erroneous notion frequently prevails, that age has changed this illegal user into a right.

There is, however, a provision in the new General Enclosure Act, that rights of common not sustainable in law shall be held good after sixty years' user. We must humbly wait the construction of the Courts upon this clause, since, if it be taken to turn every user into a right, it will turn a surcharge into a right; and if the benefit of the sixty years' user be confined to that which is in legal language a right of common, this section will have no operation at all.

It is, however, contrary to the very essence of a right of common that one man should have power to turn out an unlimited number of cattle, by which the whole herbage might be consumed, to his sole profit.* Such a user the law considers

* Of this nature was the *Newbury* case, mentioned by Mr. R. F. Graham in his evidence before the Committee on Commons' Enclosure.

The case laid before Sir *Wm. Follett* and Mr. *Bellenden Ker* stated, that "the common fields of Newbury were held in severalty from the 8th November until the corn of the ensuing summer was wholly cleared; they were then thrown open for the pasturage of all kinds of cattle—not only the cattle of the proprietors of those particular lands, but of all

not as a right, but as a wrong; and a man can no more prescribe for it than he can for a right to clip the Queen's coin.

When a user of this kind shall be found to be of long continuance, it will be well to inquire, before declaring it illegal, whether the soil itself be not the property of the persons thus using the waste. If it should be found that the soil itself belongs to the persons claiming as commoners, the user does not show a right of common, which is a right to use the natural produce of *another's* soil; but it shows an actual estate. The claimants are

freeholders and inhabitant householders within the town and parish of Newbury, without any stint or distinction whatever, and without reference to the possession or occupation of land. It is an undoubted fact, that the inhabitant householders, though not in possession or occupation of any land whatever, have for a very long series of years claimed and enjoyed this privilege, and it has not in the memory of the oldest inhabitant been successfully resisted."

The learned counsel before whom this case was laid were clearly of opinion that "such a right as is here claimed cannot legally exist as a right of common over the lands of another person."

The policy of the rule of law, which declares any unlimited user of a common to be an illegal user, and not a right, is well exemplified by this very case; for it is there stated that "the number of cattle seems to be unlimited, but perhaps not one-twentieth part, or a much less proportion, have exercised this right over the common fields. Of those who do exercise this right, some few do so to the injury of others, by turning out a very large number of cattle belonging to themselves, or perhaps to other people: and instances are not wanting where horse dealers have become temporary inhabitants, merely for the purpose of enjoying the benefit of the turn-out." — *Report of the Committee on Commons' Enclosure*, p. 314.

not commoners, but landowners. They have the soil of the waste as tenants in common.*

III. *Common of Pasture in Gross* is an integral right, which enables a man, without connection of tenure, to depasture his cattle in the ground of another person. It may depend upon prescription, or may be at the present day created by grant.†

Common of pasture in gross is either for a number certain, or is, in the words of our law books, *sans nombre*. This latter term, however, does not signify an unlimited right, for, as observed by *Babington C. J.*‡, a claim of common *sans nombre* cannot mean a claim of feeding for innumerable beasts, but for a number not certain; so that if one were disseised of such a common, he might bring an assize of common *sans nombre*, according to the deed, since he would not claim a right for a defined number of cattle." Lord *Coke* intimates a similar opinion as to the limitation of this right, when he says § that there may be common *sans nombre* in gross, and yet that the tenant of the land must common or feed them also.

The cases upon this subject are numerous and contradictory.|| *Blackstone* draws from them the

* *Benson v. Chester*, 8 T. R. 400.; *Revell v. Joddrell*, 2 T. R. 415.; see also Sir *Wm. Follett's* opinion upon the *Newbury* case, Report of Committee on Inclosures, p. 316.

† Co. Lit. 122 a., 4 Rep. 38., 2 Inst. 477.

‡ 11 H. 6. 22 B.

§ Co. Lit. 122 a.

|| See *Saye's case*, March, 83.; *Mellor v. Spateman*,

conclusion, that it is a right possible in law, but one which, in fact, does very rarely exist.* The authorities, however, upon which this possibility in law rests, show that a right of common in pasture in gross *sans sombre* is limited to a right to turn on so many cattle as the common will maintain beyond the *levant* and *couchant* cattle of the lord and the commoners.

A common in gross can only be prescribed for by parties capable of taking by grant; inhabitants or occupiers, as such, cannot so take, and cannot therefore so prescribe.

In a case† where certain inhabitants prescribed generally for all manner of beasts, without alleging levancy and couchancy, the Court decided against the claim, stating, that a man might prescribe to have common for all manner of beasts by reason of his person, but that inhabitants, as such, were incapable of taking by prescription.

The parson of a church or like corporation sole, or a lay corporation — although these last may have an origin posterior to the time of legal memory — may prescribe for common in gross.‡ It has been

Saund. 343., against the legality of a right of common in gross *sans nombre*; and 22 Ass. pl. 36., 11 H. 6. 22 B., 12 H. 8. 2.; *Stables v. Mellon*, 2 Lev. 246., 2 Show. 43., Sir Thos. Jones, 115.; and *Stamford v. Bruges*, Shep. Abr. 331., all in a greater or less degree recognising the legality of such a right.

* 3 Com. 239.

† 15 E. 4. 32. B. 33.

‡ 2 Bl. Com. 34., *Mellor v. Spateman*, 1 Saund. 343.

held, however, in some early cases, that the king or the lord shall not have a common *sans nombre*.*

Many instances of user, commonly classed as rights of common of pasture in gross *sans nombre* (over commonable lands) are improperly so called. Thus, when there is a flock-master, who has the sole right of feeding his sheep over the common, his right is not properly a claim of common, but as something reserved out of the original grant.†

IV. *Common of Pasture by reason of Vicinage*.—This is said to exist when the inhabitants of one or more townships or vills lying contiguous, or the tenants of two or more manors adjoining to each other, have been accustomed to intercommon time out of mind, the commonable beasts of either straying into the other fields without molestation.

And first, such a right can only exist between contiguous wastes; for if there should be three vills, A., B., and C., and B. is in the middle between the other two, B. may intercommon with A. and C., but A. and C. shall not intercommon with each other, because B. intervenes.‡

Secondly, the right must be mutual between the commoners of the two commons; for the reason the law allows this right is, to avoid suits which would arise if actions could be brought for every trespass when there is no separation or

* 27 H. 8. 10 B., Davis, Rep. 2.

† Per *Tindal* C. J., in *Ivatt v. Mann*, 4 Scott, N. R. 342.

‡ Dy. 47 b., per *Shelley*.

inclosure between the commons.* And therefore the intercommoning must take place at the same time, for if one will have common in another vill during one season of the year, and the other have common in the first during another season, or every second year, that is not common of vicinage.†

Thirdly, this right of common must have existed from time whereof the memory of man runneth not to the contrary.‡

Fourthly, the right of common pur cause, &c., does not extend to the turning of cattle upon the neighbouring common, but only to the allowing of cattle originally turned upon the home common to stray upon the other. Lord *Coke* says §, common pur cause differs from the other commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity.||

Fifthly. This right of common can only exist between commons lying open the one to the other and may at any time be destroyed by a division

* Per *Wray* C. J., *Tyringham's case*, 4 Rep. 37.

† Per *Baldwin*, Dy. 47 b.

‡ 13 H. 7., 13 Dy. 46.

§ Co. Lit. 122 a.; and see 11 Mod. 73.

|| It is said that common pur cause, &c. is in this manner. Those of Dale put their beasts in their own demesnes, and if the beasts of their own will enter upon the land of Sale, then it is not lawful to drive them thence; but if they are put into Sale it is otherwise. 13 H. 7. 13., Bro. Com. pl. 5., Dy. 316.

of the two commons by such a fence as will keep out cattle.

This division must, however, be perfect, for where one of two adjoining commons, with common of vicinage, was enclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other, it was held that, as the separation was not complete, so as to prevent cattle from straying from one to the other by means of the highway, the common by vicinage still continued.*

This common of vicinage is also limited. The limitation is this, — that the commoners of neither of the commons shall turn on their common more beasts than their own common will feed.†

The common of vicinage has many points of resemblance to a common appendant; and when we find a user of common claimed by reason of vicinage, but offending in some of its circumstances against the foregoing rules, it will be well to consider whether such user, although bad as a common of vicinage, may not be good as a common appendant.‡

* *Gullett v. Lopes*, 13 East, 348.

† *Termes de la Ley*, p. 150, *et seq.*; Sir Miles Corbet's case, 7 Rep. 5.

‡ *Vide ante*, p. 14.

CHAPTER III.

OF COMMONS OTHER THAN COMMON OF PASTURE. — ESTOVERS. — TURBARY. — COMMON IN THE SOIL. — PISCARY.

I. *Common of Estovers.* — ESTOVERS, from a Norman word, either signifying to furnish or to sustain, is the profit which a man has in the soil of another, to cut or prune from his forest or other wastes wood for his building, enclosing, and firing, or other necessary purposes.*

The right to this common, like to the common of pasture, may be appendant, appurtenant, or in gross; but it may not be by cause of vicinage, the reason which allows the common of pasture by vicinage not here applying.

We have already remarked, that the term *Estovers* includes as its parts house-bote, plough-bote and cart-bote, and hay-bote.

The cases in the books which distinguish when this right is to be pleaded as a custom, and when as a prescription, are of little application to the purpose of this introduction. It is perhaps sufficient to observe, that the exercise of this right is governed by rules strictly analogous to those laid

* Bracton, 136.

down as governing the exercise of the common of pasture.

Thus the claim must be in respect of an ancient tenement; for even if a man have a common of this nature by grant, he cannot build new houses, and extend his common right to these.* So, if there be a prescription for fire-bote to burn in a hall, this will not extend to the consumption upon the same premises after they have been converted into a kitchen or a malt-house.† But if a house be enlarged, the fire-bote shall remain to the old chimneys‡; or if it be rebuilt upon the old site. And it is a general rule, that the alteration of the quality or name of part of a house does not cause any prejudice to the estovers and services attached to it.§

Plough-bote, cart-bote, and hay-bote, if not in gross, must be necessarily appendant or appurtenant to land; and in this case of estovers we find especially marked the distinction between common appendant and common appurtenant—common claimed by custom, and common claimed by prescription.

Custom is the usage of a right throughout some ancient district, comprising many claimants within its circuit; prescription is the continual usage of a particular private right. A custom, however,

* 4 Rep. 86.

† Id.

‡ Brown & Tucker's case, 2 Lord Raym. p. 100.

§ Luttrell's case, 4 Rep. 88.

to take a profit *in alieno solo* has been adjudged bad *, except in the case of copyholders.

Thus, in *Selby v Robinson* †, a custom was set up to the effect that all the poor householders within the township had been accustomed from time immemorial to take estovers from a certain chase for necessary fuel, to be consumed in their respective dwelling-houses within the township. But the Court, after verdict finding the custom, declared it bad, for there was not any limitation. If the right had been laid as prescriptive, and as applying to *certain ancient* houses, it might have been good. ‡

Copyholders may of common right take estovers, to be expended upon their copyholds, where a custom to this effect exists in the manor §, but not otherwise.

It the absence of a specific prescription to the contrary ||, the commoner ought to confine himself to the taking of underwood, shrubs, and loppings. Under an express grant of fire-bote, however, timber may be taken in default of underwood. ¶

The estovers thus taken must be spent upon

* Gateward's case, 6 Rep. 59.; *Bean v. Bloom*, 2 W. Bl. 926.; *Grimstead v. Marlowe*, 4 T. R. 717.

† 2 T. R. 758.

‡ But see *Arundel v. Steere*, Cro. Jac. 25. and 256.; and *White v. Coleman*, Freem. 174.; whence it would appear that inhabitants may have this right.

§ 2 Brown, 329., 2 Saund. 320., 1 Ventr. 123. 163.

|| *Fisher v. Wren*, 3 Mod. 250.

¶ Bac. Abr. tit. Common; 3 Leon. 16.

the premises which give the right to take them. In the Earl of Pembroke's case*, the commoner having house-bote cut down four trees for the purpose of repairing the posts that sustained the mud walls of his house. The wood proving unfit for this purpose, it was held that he could not exchange it for other, or enlarge the house with it, or board up the sides of the mud walls.

These estovers are inseparable from the premises which give the right to them. So that if a man have a life estate in a house, and another grant to him and his heirs sufficient estovers to be burnt in that house, the right shall pass with the house to the remainderman. †

Therefore, it has been laid down that common of estovers cannot exist in gross, because the reasonableness of the quantity must be limited by the necessity for fuel or repairs. ‡ It is submitted, however, that a prescription for a quantity *certain* of estovers would be not only good in gross §, but might be severed from the premises to which it was appurtenant.

II. *Common of Turbary*.—A right of common of turbary, which is a right of digging turf upon another's ground, may also be either appendant, appurtenant, or in gross. The right may be appendant to any ancient tenement || within the

* Clayt. 47.

† 8 Rep. 54.

‡ 5 H. 7. 7 B. per *Fairfax*.

§ Co. Lit. 121 b.

|| The common of turbary must be appendant or appurte-

manor, or appurtenant to any ancient tenement in or out of the manor, or may be appurtenant to a modern tenement, if there be a specific grant.

The turves, however, must be expended on the premises to which the right is appendant or appurtenant, and this even although the quantity is certain; as that the claimant should have as much turf as two men could dig in one day.* A claim in virtue of a tenement of cutting and *selling* turf, is bad.†

An unlimited claim to cut turves and sell them, would probably be held bad even as a claim of a right in gross, for the prescription must be limited to some reasonable direption of the soil; and a custom to take turves covered with grass, to be spent upon the tenements of the commoners, for the purpose of making and repairing grass-plots in their gardens, and for improvements therein,

nant to a house, and not to land. "Prescription," writes Lord *Coke*, "doth not make any thing appendant or appurtenant unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. But things incorporeal which lie in grant, as advowsons, villeins, commons, and the like, may be appendant to things corporeal, as a manor house, or lands, or things corporeal to things incorporeal, as lands to an office. By yet (as hath been said) they must agree in nature and quality, for common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house, to be spent there." Co. Lit. 121 b.

* *Hayward v. Cunningham*, 1 Lev. 231., 1 Sid. 354.

† *Valentine v. Penny, Noy*, Rep. 145.

was held to be unreasonable and uncertain, Lord *Ellenborough* C. J. saying, "A custom, however ancient, must not be indefinite and uncertain. A custom of this description ought to have some limit, but here there is no limitation." *

Inhabitants cannot prescribe for a right of common of turbary †, but it has been said that a free-man may have a right to take turves for his own use ‡; and it has been held in one case, that a mayor and burgesses may prescribe to have such a right of common for themselves and the inhabitants of their town. §

In this case, *Vaughan* J. said, "Though inhabitants cannot prescribe for common in their own names, yet they may be capable of the benefit of such a prescription; and as this prescription is laid upon the mayor and burgesses, they may prescribe for them and for the inhabitants, and this is the direction given in 15 Ed. 4. 29., by *Littleton*."

III. *Common in the Soil*. — Lord *Coke* mentions as a recognised species of common "the digging for coals, minerals, and the like." ||

Thus a prescription to dig stones for the purpose of repairing the commoner's house has been

* *Wilson v. Willes*, 7 East, 127.

† 2 Atk. 189.

‡ 1 M. & S. 474.

§ *White v. Coleman*, Freem. 134.

|| Co. Lit. 122 a.

recognised*, and the practice of digging sand and gravel is one of very general occurrence.†

These prescriptions, however, must fall within the usual rules. The right must be claimed by persons capable of taking by grant, must be certain and reasonable in their nature, and must (except perhaps when the quantity to be taken is certain, be used by the commoner himself.

IV. *Common of Piscary.* — This, like other commons, may either be appendant, appurtenant, or in gross.‡

This right of common cannot exist in the sea, or in navigable rivers, for these are open to all the Queen's subjects.§

The right must be exercised in a reasonable manner, and according to the terms of the custom or prescription. The fish should be taken for the use of the commoner's table, and not for sale; and with lawful nets; for, although the statute for regulating the size of nets extends only to havens, harbours, or creeks, or within five miles thereof, yet fishing with unlawful nets is an offence at common law.||

* *Incedon v. Burges*, Carth. 65.

† 13 East, 155.; *Duberley v. Page*, 2 T. R. 391.

‡ 34 Ass. p. 11.

§ *Ward v. Cresswell*, Willes, 265.; and see Co. Lit. 122 a., and Mr. Butler's note, 181. thereon, as to several fishery, common of fishery, and free fishery. The distinctions are not of sufficient importance to our present purpose to be discussed here.

|| *Warren v. Matthews*, 6 Mod. 73.

CHAPTER IV.

OF WASTES.

SECT. I. COMMON LANDS.—*The Manorial Waste. Woodlands. Stinted Pastures. Forests.*

SECT. II. COMMONABLE LANDS.—*Lammas Lands. Shack.*

HAVING thus laid down the rules which distinguish a right of common from an illegal user, it will be easy to apply these rules to any one of the infinite varieties of customs of pasturing in common which obtain throughout the country.

It has already been remarked, that the word Waste (although the usual term employed by our law writers) is but ill calculated to convey a general description of lands upon which common rights attach. These lands are generally spoken of as either common lands or commonable lands. Common lands are uncultivated wastes, upon which no severalty rights attach: commonable lands are lands which are held in severalty during a portion of the year, but which lands, after the severalty crop has been removed, are commonable. It may not be inexpedient to consider here a few of the most prevailing species of common and commonable lands.

I. *Common Lands.* — The first and most usual

species of common lands is the manorial waste, where the pasture is stinted only by levancy and couchancy, and by the rights of the lord.

A second class of common lands are woodlands.

These, however, do not appear to differ in any material respect from ordinary wastes, except that they peculiarly bear the burden of the common of estovers, and that there is a right, the measure of which is determined by usage, of shutting out the commoners' stock for some reasonable time after felling, in order to the preservation of the young trees.

A third class of common lands are stinted pastures. It has, however, been doubted whether a stinted right of pasture is in reality a right of common. In the *King v. Whixley* * it was said *arguendo*, "These cattle-gates are not like commons. The owners of them are tenants in common; they have a joint possession and a several inheritance, and are as much demiseable as any several tenement whatsoever. There is a material difference between cattle-gates and rights of common. Lord *Coke* enumerates four sorts of common, but a cattle-gate does not come within the description of any of them. The owner of a cattle-gate has it not in respect of any custom, but as having a joint interest in the soil, which a person having a right of common has not."

* 1 T. R. 137.

Lord *Mansfield* C. J. seems to have adopted this definition. The court held that a cattle-gate was a tenement sufficient to create a settlement, and his Lordship said, " These cattle-gates pass by lease and release, and cannot be devised but according to the Statute of Frauds. They are therefore to be considered as a tenement within the statute."

There are also lands which in ordinary parlance are called common, although the right of pasture over them is in an individual. Such are the small plots of pasture often in the middle of a waste, called sheep-heaves, the soil of which may or may not be in the lord, but the pasture is certainly a private property, and is leased and sold as such.

These sheep-heaves obtain chiefly in the northern counties, and are possibly derived from that state of continual border warfare which was peculiarly favourable to the creation of rights of common in gross. In a country where a plunderer was every moment to be expected, it was absolutely necessary that there should be a perpetual staff of warders; and the most obvious and the least burdensome way of remunerating them was, to give them especial rights upon the commons which they watched. Thus, he who wound the horn, lighted the beacon, kept the red spear-house, or performed any other of the more onerous and unintermitting militia duties, held

rights upon the common in respect of his office. Now that the duties have ceased, the rights come down to us evidenced only by their immemorial enjoyment, and are held, and well held, by prescription.

We have a fourth class of common lands in the royal forests.

When our early kings, by virtue of their stringent prerogative, laid waste wide tracts of country to form their forests, they expressly reserved to all who had common within the territory their prescriptive rights of herbage, and other articles of common user, not inconsistent with the new purpose to which the land was now set apart. *

The jurisdiction over these forest rights was, however, taken from the ordinary courts, and vested in the justices in eyre of the King's forests, one whereof was appointed for the forests north of the Trent, and another for the forests to the south thereof. The king's lieutenant of the forest, the verderers, and chief foresters, formed a court of apportionment in case of complaints of surcharging of forests; and these officers, by virtue of a writ issuing out of Chancery, inquired into the size of the waste, and of the lands which had common thereon, and apportioned each man's cattle which ought to feed therein—a proceeding

* *Charta Forestæ*, 9 H. 3. c. 1.

in the nature of a writ of admeasurement at common law.*

The office of justice in eyre of the forests, which in the time of the early Norman kings was one of high dignity and important functions†, fell into disuse as the rigours of the forest laws became relaxed; were discharged by deputy‡, and at length were abolished by statute.§ Some of the minor offices and courts are retained, and fees in respect of them (especially for faunage) are still paid by the commoners upon the forests.

There are some few points in which common of pasture in a forest differs from a similar common over an ordinary waste.

1. When the right is appendant or appurtenant, the land in respect of which the right accrues must be within the forest: and if this land be disafforested, the common right is gone.||

2nd. Common appendant within a forest is for all beasts except goats, sheep, and swine¶; geese also are excluded. Common appurtenant, however, being by prescription, may include all these.**

* Manwaring on Forests, p. 100, *et seq.*

† See the *Capitula Itineris in Hoveden, Aug. rer. Script.* pp. 744. 784.

‡ By stat. 32 Hen. 8. c. 35.

§ 57 Geo. 3. c. 61.

|| This distinction depends upon the 33 Ed. 1. stat. 5. *Ordinatio forestæ*. *Woobridge v. Dovey*, Hardr. 87.; and see Sir F. Barrington's case, 8 Rep. 136.

¶ *Webb's case*, 3 Bulst. 213.

** *Case of Leicester Forest*, Cro. Jac. 155.

In practice, therefore, a common of pasture in a forest will not extend to goats, sheep, swine, or geese, unless there be an immemorial usage to admit these animals to pasture.

It follows that pannage, which is the right of feeding swine upon the beech masts, acorns, &c. within the forest, must be enjoyed by virtue of a right appurtenant and not appendant. But when the pannage claimed is to take away the mast for the purpose of feeding the swine elsewhere, it would appear that the right may be appendant.

The user of the forests has been restrained by several statutes, having for their object the preservation of the timber and of the deer, but it is not within the scope of this Introduction to enter upon their provisions.

II. *Commonable Lands.* — The first and most important class of commonable lands are Lammas lands. These are open arable and meadow lands, held in severalty during a portion of the year, but which, after the severalty crop has been removed, are commonable not only to the parties who have the severalty right, but to other classes of individuals.

These commoners upon Lammas lands are sometimes the inhabitants of the parish; sometimes a class of inhabitants, as the freemen of the neighbouring town, or even the householders; and perhaps more generally to the owners of ancient

tenements within the parish, usually termed toft owners.

In the case] of inhabitants we have already seen, that the user would be bad unless the right be vested in some person or corporate body capable of taking by grant, or unless the user should be held to be good after sixty years' duration, under the 54th section of the General Enclosure Act.

Where these rights are limited by number, or by levancy and couchancy, immemorial usage will make them good in law, as that every householder in right of his house, or that every freeman in right of his franchise, should turn on one beast; but if there be no such limit, the user is illegal, and no continuance of it (unless by the provision above cited) could ever turn it into a right.*

This class of commonable lands comprises very great varieties as to severalty holdings. In many instances the severalty holding varies from year to year. There are in these open lands what is called a pane of land, in which there may be forty or sixty different lots. It often happens that in these shifting severalties the occupier of Lot 1. this year goes round the whole of the several lots in rotation: the owner of Lot 1. this year has Lot 2. the next, and so on. Arable lands change not annually, but periodically, according to the rotation of the crops. Then there is the old lot meadow, in which the owners draw lots for the

* Vide *ante*, p. 21., and *post*, p. 43.

choice. They all, however, agree in that as soon as the crops are removed, they become commonable.

The origin of these shifting severalties was much discussed by the Enclosure Committee of the House of Commons, but with no great success. We know from Cæsar* that this tenure was common among the most warlike tribes of the Gauls; and from Tacitus† that it was equally in use among the German tribes. It is also probable that some traces of a similar custom would linger among the Normans, and that in this people it would partake of their chivalrous character, and the distribution be decided by single combat.

In times posterior to the Conquest land has been granted upon many whimsical tenures.

These curious shifting severalties are therefore assignable to no single origin, but are probably

* Cæsar (*de Bel. Gal.* l. iv. c. 1.) says of the Suevi that they divided themselves into two portions, one of which went out to war, while the other stayed at home to cultivate the land; each therefore taking alternately their year of tillage and pillage. He adds, "Sed privati ac separati agri apud eos nihil est; neque longius anno remanere uno in loco licet."

† The historian remarks, "Agri pro numero cultorum ab universis *per vices* occupantur quos mox inter se secundum dignationem partiuntur. *Arva per annos mutant.*" (Tacit. de Moribus Ger.) In the same treatise the historian celebrates the inordinate love of the German tribes for dice: "Aleam Sobrii inter seria exercent, tantâ lucrandi perdendive temeritate, ut cum omnia defecerunt, extremo et novissimo jactu de libertate et de corpore contendunt." It is not unnatural to suppose that among such a people the annual division of their lands was often decided by lot.

the residue of the tenures of all the different races which have possessed the island. Some may even be derived from the Gauls, who first colonised the country, and may be an attenuated descendant of the custom preserved by Cæsar. The lot meadow, possibly derived from the Saxons, may be the modern version of the custom described by Tacitus; while in the rule, still extant in some places*, of awarding a choice of lots to the best runner or the best wrestler, we may possibly recognise a Norman origin.

A second portion of commonable lands is Shack land; land over which a custom to go at shack, which signifies to go at large, prevails.

This shack land is open arable land, held in severalty during a portion of the year, namely, until the crop has accrued. After the crop has been removed, these lands become commonable to all the parties having a severalty right, but to no others.

The practice often is, that this intercommoning shall be without stint. Such practice, however, is certainly illegal. Much of the law upon this subject will be found collected in Serjeant Wilson's note to Sir Miles Corbet's case†, whence it

* These remarks, suggested by a conversation in the Commons' Enclosure Committee, have little relation to the practical objects of this little treatise; but it may perhaps be pardoned, even to a law writer, that he glance for a moment at these interesting memorials of early ages, now when they are about to be destroyed for ever.

† 7 Rep. 5.

appears that the courts have likened this custom to a common of vicinage, and have intimated that it is subject to the same limitation, and even, if usage should authorise it, to the same power of enclosure.

The severalty holders upon shack lands are usually the holders of the fee of their several portions.*

The prescriptive rights of flockmasters have usually been referred to this division. The case of *Jones v. Richards* is a leading case upon this subject.† There the owner of the farm of B. prescribed for the sole and exclusive right of pasture and feeding of sheep and lambs on L. The Court held that this did not give him a right to take in the sheep and lambs of other persons to pasture on L., inasmuch as by the terms of the prescription some interest remained to the lord. Lord *Denman* C. J., in delivering judgment, said, "By the terms of this prescription the grantee's right is limited to the feeding of sheep and lambs.

* These commonable lands have hitherto been unnoticed by law writers. I am indebted for the foregoing account to the evidence, before the Commons Enclosure Committee, of Mr. Blamire, a gentleman who may well be considered as the author of the three great rural reforms of the age—commutation of tithes, enfranchisement of copyholds, and enclosure of commons; and upon whose judgment we may rely with a comfortable assurance, in all things wherein profound sagacity and unwearied assiduity can secure correctness.

† 6 A. & E. 530.

This would be wholly insensible if the entire pasture were granted to him in exclusion of the lord. Further, the right to feed by sheep is not limited by number, so as to make it indifferent to the lord by whose sheep the pasturage is enjoyed, but is a grant to the occupier of Blaenmerin, and is appurtenant to that farm. *The principle seems to be, to ascertain the extent of the rights conferred and the rights reserved by the grant, and to see whether the act be in derogation of the latter."*

CHAPTER V.

ON THE CREATION, ALIENATION, AND EXTIN-
GUISHMENT OF RIGHTS OF COMMON.

EVERY right of common is created either by an act of parliament, evidenced in modern times by a custom, or by a grant, which may be evidenced either by a prescription or by the deed itself.*

A common cannot be created by means of a bargain and sale, for the object of sale is not *in esse*.†

The grant must be by deed.‡

With respect to the alienation of rights of common, common appendant will pass under a conveyance of the land to which it is appendant; for it is a rule that whatever is incident to land will pass by the description of land.§ Nor can

* Every custom supposes an Act of parliament, or a law made in former times by an equivalent power; but a prescription supposes only a grant. *Harland v. Cooke*, Free. 320.

An Act, however, will not be presumed in favour of an unreasonable custom, and a prescription cannot exist in that which cannot be granted. *Weekly v. Wildman*, 1 Ld. Raym. 407.

† *Speaker v. Styant*, Cro. Jac. 189., Comb. 127.

‡ *Sup.*, and 2 Ro. Ab. 63., 1 Ro. Ab. 102.

§ *Solme v. Bullock*, 3 Lev. 165.; *Sacheverill v. Porter*, Cro. Car. 482., 2 Ro. Ab. 60. As to whether a custom to

common appendant be otherwise conveyed than with the land to which it is appendant.

Common appurtenant, so long as it continues appurtenant, will also pass by any deed which grants, bargains, and sells, leases and releases, licenses or devises the land to which it is appurtenant. It is only when the right is for a fixed number of cattle that it can be granted away as a substantive property, severed from its dependence upon land.

Common in gross for a certain number of cattle differs in no respect from that just mentioned, and may be passed in the same manner by deed. But it is said that common in gross, *sans nombre*, can only be granted over when enjoyed in fee, and cannot be aliened by grantees in tail for life or for years; and the reason assigned is, that it would be to the prejudice of other commoners, that an unlimited licence to depasture should be passed to one who has a thousand sheep, while the original grantor might have had but a hundred.* The reason is not very conclusive; nor would this doctrine, probably, be sustained in the present day.†

By a grant of all demesnes, the waste itself will

demise rights of common by parol can be supported, see *Lothbury v. Arnold*, 1 Bing. 219., 8 Moore, 72.; *Rex v. Lane*, 1 D. & R. 76., 5 B. & A. 488.

* 2 Rep. 73.; *Stampe v. Burgesse*, 1 Ld. Raym. 407.

† See *Jones v. Richards*, 6 A. & E. 530.

pass*, and so strong is the general principle already quoted, namely, that whatever is incident to land will pass by the description of land, that it has been said that a common appendant or appurtenant will so pass, even although the common were expressly reserved.†

But as the usual general words are unnecessary to pass a right of common dependent upon land, so are they incapable either of creating or reviving such a right.‡

A right of common may be extinguished by several means.

1. By unity of possession. When the ownership of the whole of the land which gives the right, and that of the land which is the subject of the right, unite (by purchase) in the same person, the right of common becomes extinguished.§ Copyholds, however, form an exception to this rule. When a copyhold tenement has been seized into the hands of the lord, who regrants it as copyhold, the right of common is not extinct.||

There are many other exceptions to this rule, but an examination of them would exceed the limits of this introduction.

2. A right of common may be extinguished by

* 2 Keb. 577.

† 7 T. R. 647.

‡ *Marshall v. Hunter*, Cro. Jac. 253.

§ *Tyringham's case*, 4 Rep. 38.; *Nelson's case*, 3 Leon. 128.

|| *Badger v. Ford*, 3 B. & A. 153.

EXTINGUISHMENT OF RIGHTS OF COMMON. 49

release from the commoner to the lord, and it has been said that by a release of any portion of his right, even yielding up his profit in one acre only, his common in the whole waste is gone. This doctrine has, however, been much discredited by more recent cases.*

3. By the dissolution of the estate to which the common is appendant.†

Thus, where a copyholder purchases the freehold of his estate, he loses his right of common‡, if the soil of the common be the soil of the lord§, and if the common be not specifically regranted. And when a corporation having common in gross is dissolved, the right is extinct.||

4. Lawful enclosure of the common necessarily works an extinction of common rights; and this may be either by the lord, in virtue of his power of approvement, of which we shall have occasion to speak hereafter; or by general agreement among the lord and commoners; or by Act of parliament; or, lastly, by usurpation, legalised by lapse of time.

There are also some ancient decisions, in which it has been held, that by enclosing or taking a lease of any portion of the waste a commoner suspends

* Cro. Eliz. 594., 1 Brownl. 180., 1 Show, 350., 3 Keb. 24.

† 8 T. R. 401.

‡ Fort v. Ward, Mo. 667., Cro. Jac. 253.

§ Dy. 339 a.

|| 27 H. 8. 10.

his right of common during his actual severalty enjoyment.*

With respect to revival of rights thus extinguished or suspended, we have already seen that this revival does not accrue from general words, such as all commons appertaining, &c., because the right is no longer in existence. The general rule, however, is, that if a grant be made of all commons used or occupied with the land conveyed or leased, an extinguished right will revive.†

A licence to put beasts upon a common must be confirmed by deed.‡

Parceners or joint-tenants of rights of common cannot devise by reason of the accruing survivorship. If one aliens his rights to another, the transmission must be by release.§

There are some commonable rights, however, which cannot be divided among coparceners as a common in gross *sans nombre*. In such case the right of common must be enjoyed by one of the parceners, and an equivalent allowed out of some other part of the estate, or each parcener must have the alternate enjoyment for a certain time.||

* 11 Hen. 6. 22., 9 Rep. 135 a.

† Cro. Eliz. 570. 794., Cro. Jac. 253.

‡ Monk v. Butler, Cro. Jac. 574., Cro. Car. 482.

§ 2 Cru. Dig. 504.

|| Co. Lit. 165 a., Fleta, 314.

CHAPTER VI.

OF THE RIGHTS OF LORDS OF THE SOIL, AND
OF COMMONERS.

SECT. I. RIGHTS OF THE LORD. — *To Approve—to Common—to Mines.*

SECT. II. RIGHTS OF THE COMMONER. — *Dependent upon Custom or Prescription.—What Customs are good.*

I. *Rights of the Lord.* — THE lord of the soil is, according to the old law maxim, owner of every thing upwards to heaven and downwards to the centre, except such things as custom, usage, or grant, has conferred upon the commoners.

So long, therefore, as he does not interfere with their rights, he may use the land and the produce thereof as absolutely as if no right of common had place upon it.*

While sufficient common is left to the commoner, the owner of the soil may plant trees, breed conies†, depasture cattle, grant licences to strangers, and enclose or, as the law terms it, approve the waste.

* 3 Cru. Dig. 93., 2 M. & S. 184.

† 1 Lutw. 107.

In ancient times these rights were doubtless of more value than they are at present. Long after the origin of manors, the waste was sufficient to depasture all the cattle used in agriculture, and to leave a large residue to the lord. As, however, the cultivated lands have gradually increased, and have all by usage and efflux of time obtained the privileges of ancient arable land, it became rare to find a common which could sustain more cattle than might be levant and couchant upon the old enclosures to which it was attached. If any such be now left, there can be no doubt of the law that, in the absence of an express prescription to the contrary, the overplus belongs to the lord of the soil.

The right of enclosing the superfluous waste, or, as it is technically called, the right of improvement, was granted, or, more properly, confirmed, to the owners of the soil of waste lands by the stat. of Merton, extended by the stat. of West. 2., and confirmed by the 3 & 4 Ed. 6. c. 3. Many decisions upon the construction of these statutes are recorded by our older reporters; but the privilege is of too little practical value in modern times to require more than an allusion in this Introduction.

The lord has also other rights in the waste, which he exercises with the condition of leaving sufficient common for the commoners.

By the stat. of West. 2. it is declared, that by

occasion of a windmill, sheep-cote, dairy, enlarging of a court, necessary, or curtelage, none shall be grieved by assize of novel disseisin for common of pasture.

This act has been liberally construed by the Courts, and Lord *Coke* says that the five cases above mentioned are put only for examples. It seems clear that a lord may build a house for himself or his herdsman upon the waste, without reference to sufficiency of common left, and this although the enclosure for the building should absorb two acres out of a common consisting of but three. *

It must be remembered, however, that the statute applies only to common of pasture. Other commons, such as turves or estovers, must not be injured by such building. †

It is also one of the rights of the lord, that he shall have common for his own cattle upon his own waste; and of this, so long as the waste continues a common, no prescription can deprive him, nor is such his right dependent upon there being a sufficiency of common for the other commoners.

"If a man," says Lord *Coke*, "claim by prescription any manner of common in another's land, and that the owner of the land shall be

* *Nevill v. Hamerton*, 1 Sid. 79., 1 Lev. 62., S. C.; 2 Keb. 283. 314., S. C.

† *Duberley v. Page*, 2 T. R. 391.; and see *Shakespeare v. Peppin*, 6 T. R. 747.

excluded to have pasture, estovers, or the like, this is a prescription, a custom against the law, to exclude the owner of the soil, for it is against the nature of this word *common*, and it was implied in the first grant that the owner of the soil should take his reasonable profit there, as it hath been adjudged. But a man may prescribe or allege a custom to have and enjoy, *solam vesturam terræ*, from such a day to such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separatam pasturam*, and exclude the owner of the soil from feeding there.”*

The validity of a prescription for the separate pasture has been much disputed. In the first case the Court of Common Pleas was equally divided†: in the second the Court of Queen’s Bench was inclined to think the prescription good, but the case went off‡: in the third the whole Court of Queen’s Bench adjudged for the prescription§, and this doctrine was recognised as fully established in the recent case of *Welcome v. Upton*. ||

These cases, however, merely show that this ordinary right of the lord may be taken away by a

* Co. Lit. 122 b.

† North v. Cox, Vaug. 251., 1 Lev. 253.

‡ Potter v. North, 1 Saund. 347.

§ Hopkins v. Robinson, 2 Saund. 324.

|| 6 M. & W. 543.

specific prescription of separate pasture, which of course presumes a grant. It is still however understood, that the lord cannot be excluded from his common in the waste. In the recent case of *Ivatt v. Mann*, *Tindal* C. J. observed, "A separate right of feeding and folding is not a claim of common, properly so called, but something reserved out of the original grant."*

We shall presently however see, that although the lord cannot be altogether excluded from his common, he may by prescription be partially so excluded.

So, the lord may sink shafts to work mines, and use all necessary and lawful means to procure coal or other materials from the soil, doing as little damage as possible†; and may dig brick earth‡, and breed game§, make fish-ponds, or plant trees.

In the exercise of all these rights the lord may be controlled by prescription or custom, and an action will lie against him, at the suit of a commoner, for a surcharge of any kind, or for any unnecessary opening of the soil, whereby the commoner's cattle are injured. But the commoner cannot by his own act remedy an injury done to the common by the lord. Thus, where com-

* 4 Scott, N. R. 342.

† 1 Keb. 390.

‡ 5 Vin. Abr. 7. and 39., per *Windham* J., in the notes.

§ *Hassard v. Cantrell*, 1 Lutw. 107.

moners have cut down trees, filled up coney burrows, or destroyed fish-ponds, the Courts have always held that they were not justified, and that the commoner had no right to meddle with the soil.* Nor has the commoner any right to meddle with the soil, even for the improvement of the waste—as to dig a trench, to let off water, or cut molehills or bushes—without a special prescription for that purpose.† If the commoner suffer by the lord's user of the soil, his remedy must be sought at law.

This rule, however, is to be understood to be confined to acts of the lord which are legal in their character, although wrongful in their excess, for it has been held that a commoner may throw down fences wrongfully set up, even although he might enjoy his common, but less beneficially, without throwing them down.‡

The commoner has no right to come upon the common for any other purpose than to exercise his right, and it has been held that he cannot justify against an action of trespass the coming to put his cattle into the waste, unless he has actually put them in, or unless he came for the purpose of

* *Cooper v. Marshall*, 1 Burr. 259. 265., *Ow.* 114.; *Coo v. Cawthorn*, 1 Keb. 390.; *Kirby v. Sadgrove*, 1 B. & P. 13. In *Howard v. Spencer*, 1 Keb. 884., it was said by a learned Judge that a commoner might make such an abatement against a stranger, but not against the lord.

† *Howard v. Spencer*, 1 Sid. 251.

‡ *Arlett v. Ellis*, 7 B. & C. 346.

seeing if the pasture were in a fit state to receive his cattle. *

A fortiori, therefore, a stranger has no right upon the waste, and is liable to an action of trespass, at the suit of the lord, for walking or riding there. †

2. *Rights of the Commoners.*—While in the due exercise of his rights, the commoner is, of course, not answerable for any damage which accrues to others from their own negligence or misconduct. Thus, if the lord sets up a stack of corn upon the common, and the commoners' cattle eat it, or if the owner of land in an open field, commonable after harvest, should leave his corn uncut after harvest time, in order to defeat the right of the commoners, and the commoners' cattle eat it, in neither case will there be remedy against the commoner. ‡ So where one had common for beasts levant and couchant in a certain field while it lay fresh and was not sown, and he put in his cattle when part of it was sown, it was held, that by reason of the partial sowing the commoner should not be barred from his common in the residue of the field, otherwise a part might be sown every year, to deprive the commoner of his right. § So, where there is a right of com-

* *Spelman v. Hermitage*, 5 Vin. Abr. 35.

† 5 B. & A. 315.

‡ *Farmer v. Hunt*, Cro. Jac. 271., 2 Leon. 202.

§ *Trulock v. Rigsby*, Yelv. 185., 1 Brownl. 188., S. C.

mon after the corn is taken away, the owner of the soil shall not be allowed, by sowing peas, to suspend the benefit. *

We have already seen, that in his user of the common the commoner is limited to his reasonable exigencies for the purposes for which they are conferred. Thus, the pasture must be for his own cattle; the turves or fire bote, a reasonable quantity for the fuel of the chimneys to which it is attached; the estovers, a reasonable quantity for the repair of his own fences or farm implements.

The principle upon which acts of user of a common may be tested, has been very clearly and succinctly stated by Lord *Denman*, in the modern case of *Jones v. Richards*.† “The principle seems to be,” said his lordship, “to ascertain the extent of the rights conferred, and of the rights reserved, by the grant, and to see whether the act be in derogation of the latter.”

The ascertaining the terms of the grant, however, is the point which will be presented to the arbitrator in questions of rights of common, as that of by far the most frequent occurrence, and the most practical importance.

The terms of the grant may vary, increase, or straiten the ordinary rights both of lord or commoner, until the lord may be left with scarcely more than a nominal right to his soil, or the com-

* 12 Mod. 648.

† 6 A. & E. 530.

moner may be reduced to a worthless right of pasture.

These terms can, in ordinary cases, only be ascertained as the grant itself is ascertained,—by long usage. Usage beyond memory of man is presumed to have had its origin in a legal instrument, which granted the rights as they are now enjoyed.

It follows, therefore, that the rules above laid down, as the result of decisions upon the rights of the lords of the soil and commoners, are not in all instances absolute, but are only so when founded upon statute, or when not contradicted by some uniform and ancient usage, amounting to a legal prescription or a legal custom.

It may not be improper in this place to explain the distinction between a prescription and a custom, words which are not unfrequently used by the early law writers indifferently, but which are nevertheless very distinct in their legal signification.

The difference between custom and prescription is, that custom is local, as prevailing in some certain known district, such as a county, hundred, or parish: prescription, however, is for the most part personal, attaching to a certain person and his ancestors, or a certain person and those whose estate he has, or to a body politic and their predecessors.*

* Co. Lit. 113 b., 6 Rep. 60., 8 Rep. 62.

Custom and prescription differ in these things: that custom must be limited and confined to some certain place; prescription is at large: custom is common to all the persons and lands within the limits wherein it is alleged, but prescription is confined to certain persons and things. But in this they agree, that they must be constant, without interruption, and perpetual from the time whereof the memory of man is not to the contrary; for, if there have been frequent interruptions, there can be no custom or prescription obtained; but after a custom or prescription is once duly obtained, a disturbance for ten or twenty years will not destroy it. *

We shall see hereafter that there is an important distinction in the rules of evidence, as to the proof admissible to establish a custom, and that admissible to establish a prescription.

It becomes now necessary to examine what customs and prescriptions in relation to rights of common the Courts have upheld, and what they have rejected as bad, for it is a very early maxim of our law, that *malus usus abolendus est*.

Every custom is bad which is unreasonable, uncertain, savours too much of arbitrary power, and tends to make a lord of a manor judge in his own cause. †

So a custom for the lord to grant leases of the

* Degge, 354., 7th ed.

† Wilkes v. Broadbent, 1 Wils. 63.

waste, is bad *, the Court saying, that they could never suppose that the lord would have originally reserved such a power to himself as might enable him to annihilate the common altogether.

But a custom for the lord to grant parcels of the waste, with the assent of the homage, is a reasonable custom.†

So, a custom for commoners having right of turbary in a moss, to hold certain moss dales in severalty when cleared of the turves, was held good. ‡

In this case the Court said, “Where an individual has enjoyed a right time out of mind, without being able to trace the origin or foundation of his right, a grant is presumed; and therefore, if the occupier of a certain messuage has enjoyed it, he must claim it by prescription: but when the claim depends on a general rule of property within certain limits, it is alleged as a custom, or *lex loci*. All local or real property must be governed by such law; it has no relation to persons out of the limits; property in England, Ireland, Jersey, &c., must be enjoyed according to the laws of each. So this moss, though granted to persons out of the manor, must be enjoyed subject to the laws of the manor.”

* *Badger v. Ford*, 3 B. & A. 153.; *Drury v. Moore*, 1 Star. 102.

† *Folkard v. Hemmett*, 5 T. R. 417. n.; *Boulcott v. Wennill*, 2 Camp. 261.

‡ *Clarkson v. Woodhouse*, 5 T. R. 412. n.

So, when the soil is in the commoners, a prescription to enclose mutually against each other is good.*

A custom for commoner with right of fishery to cut rushes by a river, in order to preserve the fishery, is good.†

Or to dig trenches for letting off water and improving the waste ‡, or to cut bushes, or dig molehills, for the same purpose. §

We have already seen that all such interference with the soil of the common, or with its produce, not included within the commoners' right, requires a special custom or prescription to authorise it.

A custom to have sheep fed on the common folded at night on a particular farm, has been held good. ||

In *Wilson v. Willes* ¶, the custom set up was, that within the manor there had immemorially been an ancient custom, that all the customary tenants respectively of all the customary tenements having a garden have immemorially dug, taken, and carried away, and have been used and accustomed to dig, &c., in, upon, and from the said close, by themselves and their farmers and tenants respectively, occupiers of such customary

* *Drake v. Doyly*, Noy, Rep. 14.

† *Bean v. Bloom*, 2 W. Black. 926.

‡ Godb. 182.

§ *Howard v. Spencer*, 1 Sid. 261.

|| *Brook v. Willett*, 2 H. B. 224.

¶ 7 East, 121.

tenements with the appurtenances respectively, for the time being, to be used and spent in and upon their said customary tenements with their appurtenances respectively, *for the purpose of making and repairing grass plots in the garden,* parcels of the same respectively, for the improvement thereof, such turf, covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent, every year, at all times of the year, *as often and in such quantity as occasion hath required,* as to the said customary tenements with the appurtenances respectively belonging and appertaining. Lord *Ellenborough* C. J. said, “A custom, however ancient, must not be indefinite and uncertain: and here it is not defined what sort of improvement the custom extends to: it is not stated to be in the way of agriculture or horticulture: it may mean all sorts of fanciful improvements; every part of the garden may be converted into grass-plots, and even mounds of earth raised and covered with turf from the common: there is nothing to restrain the tenants from taking the whole of the turbary of the common, and destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom, as laid, but caprice and fancy. Then this privilege is claimed to be exercised when occasion requires. What description can be more loose than that? It is not even confined

to the occasions of the garden. It resolves itself, therefore, into the mere will and pleasure of the tenant, which is inconsistent with the rights of all the other commoners, as well as the lord. The third special plea also is vastly too indefinite: it goes to establish a right to take as much of the turf off the common as any tenant pleases, for making banks and mounds on his estate: it is not even confined to purposes of agriculture. All the customs laid, therefore, are bad, as being too indefinite and uncertain."

We have already seen that a prescription to shut the lord out from user of the common is bad.*

But a prescription to exclude the lord for a limited period may be good, and generally a custom for a stinted pasture is good.

As, when the custom was to exclude the lord from the time of cutting and carrying the corn, till Lady-day†: so, to have herbage and pasturage on lands not sown.‡ Or that the common should be fallow every second year until Lady-day, after the corn was carried.§ So a custom that the lord should have common to himself until Lammas-day, and afterwards for the tenants to have it, with the exception of three horses, which the lord might put in. ||

And a custom must not be contrary to the general law of the land. ¶

* *Ante.*

† 2 Ro. Ab. 267.

|| Cro. Jac. 208.

† Fitz. Pres. 51.

§ 1 Ro. Ab. 403.

¶ Rex v. Saltern, Cald. 444.

A custom for the inhabitants of a particular place to take a profit *in alieno solo*, is bad. A right to take such a profit can only be by prescription *, and inhabitants are incapable of so taking.

So, a custom for poor and indigent householders to cut and carry away rotten boughs and branches in a chase, is bad, the description of persons entitled being too vague. † It would probably be bad also for the reason given in the case last quoted.

It must frequently happen that the prescriptive rights of the lord and the commoners encroach on each other; as when the lord's right to take his minerals makes such waste in the common as to leave no sufficient pasture.

It would appear, that in such cases the right of the lord, being the anterior and original right, must prevail, provided that the usage necessarily suggests the presumption that the right claimed and enjoyed, was reserved in the original grant, without restriction, as to the encroaching upon the rights of the commoners. In *Bateson v. Green* ‡, which was a question as to the right of the owner of the soil to dig clay pits of great size, not filling them up again, and leaving no sufficient common for the commoners, the evidence showed

* *Grimstead v. Marlowe*, 4 T. R. 717.

† *Selby v. Robinson*, 2 T. R. 758.

‡ 5 T. R. 416.

an enjoyment of the right for seventy years, during all which time the common was insufficient to the cattle of the commoners.

A verdict against the custom was set aside, *Buller J.* saying, " This case does not fall within the statute of Merton, but depends altogether on immemorial custom, as to the extent of the several rights claimed by the lord and the commoners. Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of them, the question is, which of the two rights is subservient to the other. It may be either the lord's right which is subservient to the commoners', or the commoners' which is subservient to the lord's. In general, one should say that the lord's is the superior right, because the property of the soil is in him: but if the custom established by evidence show that it is subservient to the commoners', then he cannot use the common beyond that extent: otherwise he subjects himself to an action for the excess. But here the evidence shows that the commoners' right to the enjoyment of the common has always been subservient to the lord's, for he has always dug common when, where, and in what manner he pleased; though, for a great number of years past, it was proved that there was not a sufficiency of common, as claimed by the tenants. There are the marks of old pits dug there, which are now covered again with herbage; and, it appears, for

seventy years past he has from time to time dug clay for the purpose of sale, and licensed other persons to do the same. There is no evidence to contradict this; and therefore there is no foundation for the verdict which has been given."

The lord and the commoners have together power to regulate the exercise of the common rights, some of which depend upon enactment, and some obtain by custom.

Thus, by 13 G. 3. c. 81. s. 15., lords of manors are empowered, with the consent of three-fourths of the commoners, at a meeting to be held after fourteen days' notice, to lease a twelfth part of their wastes by auction, for a term not less than four years, and to employ the rent in draining, fencing, or otherwise improving the residue.

By the next section of the same act it is provided, that in case of stinted commons, an assessment may be agreed to at a meeting similarly called, and levied upon the commoners, with a power of distress.

The lord may also by custom summon a jury, and, with their consent, make bye-laws for the preservation and regulation of the common, and an action will lie for a penalty under such bye-laws.*

* James v. Tutney, Cro. Car. 497.

CHAPTER VII.

OF ENCLOSURES.

SECT. I. *By the Lord.* — II. *By Agreement between the Lord and the Commoners.* — III. *By Act of Parliament.* — IV. *By Encroachment.*

WASTES have been enclosed either by the lord, or by agreement between the lord and the commoners, or by act of parliament; or, lastly, by encroachments illegal in their origin, but legalised after efflux of time by virtue of general acts of limitation.

I. *By the Lord.* — In treating of the rights of the lord, we have already spoken of that power of enclosure which the lord possesses, and which, in legal language, is called *approvement*.*

II. *By Agreement between the Lord and the Commoners.* — Previously to the General Enclosure Act of the last session, the law recognised no person as having any right upon a waste except the lord and the commoners. These parties, therefore, if they were all consentient, could — and indeed they still can — enclose the waste, and parcel it among themselves.

The practical difficulties in the way of such an enclosure are, however, obvious. To obtain the

* *Antè*, p. 52.

unanimous concurrence of a numerous body of commoners was seldom possible; and even if this difficulty was surmounted, it could rarely happen that of a numerous body all were capable of assenting. Thus it has generally been found necessary to obtain a private act for the confirmation of such agreement; and where this has not been done, there are few cases indeed in which the new proprietors are not, within twenty years, liable to have their fences thrown down by some commoner omitted from or unbound by the instrument.

The new act gives no power to the enclosure commissioners to confirm such agreements.*

III. *By Act of Parliament.* — A private act of parliament, authorising a commissioner to parcel out the waste in allotments, has been the ordinary agent of our modern enclosures. There are about four thousand of these acts, of which one half has been passed within the present century. †

Since the eight millions of common and commonable lands now unenclosed are to be subjected to a different process of enclosure, it forms no part of our present purpose to enter upon discussion as to the construction of these acts, the powers of the

* A clause to this effect was suggested to the Enclosure Committee (John Davies, 5314.), and its omission would appear to be an imperfection in the Act. The Tithe Commissioners have an analogous power over invalid tithe composition agreements.

† Evidence of Wm. Blamire, Esq. before the Enclosure Committee; Report.

commissioners under them, or the provisions of the General Enclosure Act. Nor will it be necessary that we here set forth the provisions of the Common Fields Enclosure Act of the 6 & 7 W. 4. c. 115., commonly called Lord Worsley's Act.

It is obvious that in the working out of these four thousand acts of parliament, very numerous cases must occur in which the awards have not been in consonance with the powers given by the act, or have never been formally completed, or have not been completed within the time limited by the act, or in which, from some other defect in the proceedings, the title is legally unsound. This is practically found to be the case to a very considerable extent. The proceedings under Lord Worsley's Act have in many cases been informal, and the machinery of that statute has often been applied to lands which the Courts do not consider to be included within its sphere of operation.

The statute 8 & 9 Vic. c. 118. s. 152. enables the enclosure commissioners to amend any award made under a local act, or under the Common Fields Act, and to rectify any inaccuracy or confusion in such award. Sec. 157. gives them power to confirm any award improperly made under the supposed authority of the Common Fields Act, and sections 153. and 154. enable the commissioners to revive powers under local enclosure acts lost by lapse of time or otherwise, and to appoint persons to complete the proceedings.

These powers are subject to restriction and reservation, for which the reader is referred to the act itself.

As future enclosures, however, will probably in nearly every instance be worked under this act; a few sentences may be advantageously devoted to a general sketch of its machinery.

Commoners desirous of enclosing must apply to the enclosure commissioners for a printed form of application. The owners of one third in value of the interests in the land fill this form up, and return it to the office. An assistant commissioner is then sent down, who inspects the land proposed to be enclosed, inquires into the correctness of the statements in the application, and holds a meeting to hear objections to the enclosure. The assistant commissioner, we will assume, reports to the Board that the enclosure should take place upon certain conditions, such as allotments for exercise or recreation, or for the labouring poor, or provisions for the protection of public rights or mineral property.

The commissioners upon this report make a provisional order, in which they set out the conditions, and also the proportion to be allotted to the lord, and state their intention either to authorise the enclosure, or to certify in their annual general report the expediency of such enclosure.

If the lands be common lands, or commonable lands within fifteen miles of London, two miles of

a town of 10,000 inhabitants, two-and-a-half miles of a town of 20,000, three miles of a town of 30,000, three-and-a-half miles of a town of 70,000, or four miles of a town of 100,000, then the commissioners will report the expediency of the enclosure to Parliament. If the proposed enclosure be of commonable and not common lands, and not within the distances above named, the commissioners may proceed without waiting for the special sanction of Parliament.

This provisional order will then be deposited in the parish, and a meeting will be held by an assistant commissioner, for the purpose of taking consents and dissents, and being satisfied that two thirds in value are consenting.

The commissioners will in one class of cases report, and wait for an act to enable them to proceed; and in the other class they will give notice of their intention to proceed with the enclosure.

As soon as the act is passed, or thirty days after the last-mentioned notice issued, the commissioners will call a meeting of persons interested in the land to be enclosed, to choose a valuer; and this meeting may give the valuer so chosen special instructions.

The valuer will then hold meetings to examine claims, which must be delivered to him in writing. These will be deposited in the parish; and if objected to, the objection must be in writing, and delivered to the valuer, and served upon the

person objected to. The claims will, at a subsequent meeting, be heard and determined by the valuer, subject to appeals to the commissioners, and thence to the courts of law.

The claims settled, the valuer allots, draws up a report and a map detailing his allotments, and deposits them for inspection.

An assistant commissioner holds an appeal meeting to hear objections to this report; and after such objections have been disposed of, the valuer, under the directions of the commissioners, draws up and signs his award, which, when confirmed by the commissioners, becomes a conclusive document.

Such is a general sketch of the course of proceeding to be adopted under the New Enclosure Act. The chief discrepancy appears to be, the submitting the decision of all legal questions to functionaries without legal education. This will necessarily give rise to very great litigation. The most skilful measurer and valuer of land may possibly hold a different opinion upon a point of evidence or the construction of a grant to that which would obtain in the Court of Queen's Bench. If it was necessary to make the valuer of the land the expounder of the law, it had been wise to leave his legal dicta without appeal.

IV. *By Encroachments.*—Wastes become enclosed by encroachments, illegal in their origin, but

legalised after efflux of time by virtue of statutes of limitation.

After twenty years' adverse possession, the right of entry is gone, and the commoner has lost all means of enforcing his right.

In *Creach v. Wilmot**, *Lee C. J.* held, that in cases of enclosures there is no difference between the lord of the manor and a commoner. "The lord could not have brought an ejectment after twenty years' possession. Here the commoner, if he had any right, should have brought an assize of common, and not made an entry." A right of common is therefore barred by the Statute of Limitations.†

By the General Enclosure Act of the last session (sec. 50.) it is enacted, that all encroachments made within twenty years shall be deemed parcel of the land to be allotted. Power, however, is given to the commissioners to allow the encroacher some limited estate in the land; and if they shall not see fit to do so, he may remove his materials.

Encroachments of twenty years standing are, by sec. 52. of the same act, to be deemed old enclosures, but not so as to carry any right of common or allotment.

As to the property of encroachments, it was formerly held, that additions made to a farm from

* 2 Taunt. 160. n.

† *Hawke v. Bacon*, 2 Taunt. 159. Recognised in *Tapley v. Wainwright*, 5 B. & Adol. 395.

the waste became the property of the tenant making them, Lord *Kenyon*, in the case of *Doe ex dem. Colcough v. Mulliner* *, saying, that “he revolted at the idea that the tenant could make the landlord a trespasser, which would unavoidably be the case if the landlord could recover.” His Lordship laid it down as clear law, that if a tenant inclosed part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord. This decision, however, does not seem to have been approved in subsequent cases; and in *Doe d. Lewis v. Rees* †, it was distinctly held, that if a tenant make an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly, from some act done at the time, that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. The same point was ruled the same way in *Doe d. Dunraven v. Williams* ‡, by Mr. Justice Coleridge; and it may now be considered as settled, that every inclosure made by a tenant adjoining his farm is *primâ facie* presumed to be made by him for the benefit of his landlord.

* 1 Esp. 458.

† 6 Car. & P. 610.

‡ 7 Id. 332.

CHAPTER VIII.

OF THE EVIDENCE IN CLAIMS OF RIGHTS OF
COMMON.

EVERY claim made under the new Enclosure Act to a right of common, must be stated in writing.* As the words of the claim will be followed by the valuer and the commissioner, and will, in case of further appeal, ultimately become the terms of the feigned issue, it is essential that such claim should be correctly worded, so as to show a legal right of common.

If it be intended to rely upon the provisions of the limitation clause of the General Inclosure Act, or of the statute 2 & 3 W. 4. c. 71., the claim should be so laid; for it has been held that the Limitation Act must be specially pleaded.†

It is at the option of the claimant whether he will rely upon his user, and rest his claim upon the limitation acts, or whether he will prove his custom, prescription, or grant, as at common law.

The enactments applicable to the former line of proof are as follow, and if they be relied upon,

* Sect. 47.

† *Welcome v. Upton*, 5 M. & W. 398., 7 D. P. C. 475.; *Reg. v. Westmark*, 2 M. & R. 305.; *Lord Stamford v. Dunbar*, Law Journal Rep. C. P., vol. xvi. N. S. p. 183.

their requisitions must be strictly fulfilled. Stat. 2 & 3 Will. 4. c. 71. s. 1., after reciting that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," was, by the law of England, in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed was sometimes defeated, by showing the commencement of such enjoyment, which was in many cases productive of inconvenience and injustice, enacts, "That no claim or grant to any right of common, or other profit or benefit to be taken and enjoyed from or upon any land of the king, his heirs or successors, or any land being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and such things as are herein specially provided for, and except tithes, rents, and services, shall, where such profit, right, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption, for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years; but such claim may be defeated in any other way by which the same is now liable to be defeated: and when such right, profit, or benefit shall have been so taken and

enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

By the seventh section, the time during which any disability exists, ex. gr., infancy, *non compos mentis*, coverture, or tenancy for life, or during which any action shall have been pending and diligently prosecuted, until abated by the death of any party thereto, may be excluded in the computation of the aforesaid periods, except only where the claim is declared to be absolute.

By section 54. of the General Enclosure Act it is provided, that where any claim shall be made to any right of common or other right which could not be sustained in law, but proof shall be made that enjoyment has been had under the right so claimed for sixty years or upwards, it shall be lawful for the valuer or commissioner to allow such claims in the same manner as if the right had been legally sustainable.

It would appear from this section to have been the intention of the legislature to legitimise every user of sixty years, and to give every man a right to do upon a common what for sixty years he had done. Whether these words will avail to carry out this intention will perhaps still be questioned.

In proving enjoyment under these acts, short

intervals of desuetude will not be considered as interruptions of the user. It has been held that an intermission for more than a year is not an interruption, and where an intermission of two years was proved, it was left as a question for the jury, whether there had been a substantial enjoyment of the right.* .

If the common-law line of proof be adopted, it will be often useful to be able to determine whether the right claimed is appendant or appurtenant.

The right may depend upon custom or upon prescription. The distinction between these two has been already sufficiently pointed out. This distinction, however, operates in a very important manner upon the evidence. To prove a custom, evidence of reputation is admissible; to prove a prescription, it is not.

Reputation and traditionary declarations must be supported by evidence of exercise of the right claimed. They must also be of a public nature, "because," said Lord *Kenyon* in *Weekes v. Sparke* †, "All mankind being interested in the subject, it is to be presumed that they will be conversant with and discourse together about it, which cannot apply to private prescription."‡ They must be also derived from persons likely to know the facts; must be general as to the whole custom, and not confined to particular places; and must have been

* *Carr v. Foster*, 6 Jur. 837.

† 1 M. & S. 679.

‡ 14 East, 327. n.

made under such circumstances that no suspicion could exist that the minds of the speakers were biassed. Especially there must have been no dispute pending as to the matter at the time of such declarations.*

The entry by homage on the court roll is evidence to prove a custom within the manor, although there be no evidence of the exercise of that custom in any particular instance: for it is the solemn opinion of the homage, delivered upon oath, upon being convened to inquire into the point, and founded on all the information which tradition and personal observation can give them.†

It is a general rule that acts done on one part of a waste may be given in evidence to show the usage on another part of the same waste.‡

But the custom of one manor or district is not admissible to prove the existence of the same custom in another.§

We have already seen, that it is not only necessary that the existence of the custom should be established by evidence, but also that the custom itself should be reasonable, certain, compulsory, and consistent.

The usual evidence, however, by which rights of common, whether customary or prescriptive, will be proved, will be that of usage; and "usage,

* B. N. P. 295.

† 5 T. R. 26.

‡ Bryan d. Child v. Winwood, 1 Taunt. 208.

§ 2 M. & S. 92

though it be not ancient, which is admissible and unopposed by opposite evidence, is usually conclusive."* Acts of usage within the knowledge and experience of living witnesses are the most obvious proofs of the existence of the right claimed. Where, however, such usage has been scanty, recourse must be had to old individuals, ancient writings, and other depositories of reputation.

When the right claimed is for common appurtenant, ancient writings and parchments, containing grants of commonable rights, are often made available. They will be properly received in evidence if drawn from a proper custody. The proper custody is the custody of the person in whose hands the document would naturally or probably have been, provided it were what it purports to be. Documents brought from the British Museum, the Bodleian Library, and other public repositories, have often been refused by the Courts, in the absence of proof that they were originally deposited there by the parties to whom their custody naturally belonged.†

The extent of the right claimed must be measured by the capacity of the ancient enclosures in respect of which the right is claimed to winter commonable beasts, unless indeed the 54th clause of the act of 8 & 9 Vict. c. 118. should be held

* *R. v. Hoyte*, 6 T. R. 430.

† *Swinerton v. Marq. of Stafford*, 3 Taunt. 91.

to convert a practice of surcharging continued for sixty years into a right.

In cases where rights of common in gross occur upon wastes whereon other commoners have rights limited by levancy and couchancy, it is submitted that the proper course of admeasurement will be, to take the total number of cattle that the old enclosures giving rights of common will winter, and adding thereunto the number conferred by the right in gross to allot proportionably. For in the numerous instances in which the waste is incapable of carrying the whole of the cattle which have rights upon it, it would be manifest injustice to allot to the commoner in gross a proportion sufficient to maintain his total number of cattle.

As to the competency of witnesses, the general rule was, that if the issue were on a customary right of common, by the establishment of which the witness would be benefited, he would be incompetent, but that when he gave evidence to establish the private prescription of another he was competent.* Thus, if the issue be on a right of common which depends on a custom pervading the whole manor, the evidence of the commoner, according to the old law, would have been inadmissible, because, as the right depends on the custom, the record in that action would be evidence in another action brought by that very

* 1 T. R. 302., 3 T. R. 32.

witness to try the same right.* But the same reason does not apply where common is claimed by prescription, in right of a particular estate; for if A. has a prescriptive right of common belonging to his estate, it does not follow that B., who has also an estate in the same manor, has the same right: and the judgment for A. would not be evidence for B.†

Recent alterations in the law have, however, greatly decreased the importance of the learning as to witnesses' incompetency by reason of interest.

By the statute of 6 & 7 Vict. c. 85., commonly called Lord Denman's Act, it is enacted, "That no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law or by consent of parties authority to hear, receive, and examine evidence, but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or

* 1 T. R. 302.

† Per *Buller J.*, 1 T. R. 303.
E 6

shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought and defended, either wholly or in part."

The evidence to rebut a claim of right of common will of course depend upon the counter claim to be set up.

Thus, if the lord or the owner of the soil claim an absolute property in himself, he may show that the land has been enclosed for twenty years*, or that he has done some act of improvement, leaving sufficient common for the commoners; or that there is a custom to erect houses on the waste, to the exclusion of the commoners, and that he has acted on such custom; or that he has, with consent of the homage, and according to the cus-

* *Creach v. Wilmot*, 2 Taunt. 160.; *Hawke v. Baron*, 2 Taunt. 156.; *Tapley v. Wainwright*, 5 B. & Adol. 395.

tom of the manor, granted stripes of land, being the land over which common is claimed, for the purposes of building; or that the waste has been enclosed under an enclosure act; or, in cases of claim of common for cause of vicinage, that the lord of either waste has enclosed some part of his waste*; or that the claimant or those under whom he claims has released the whole or some part of his right of common. †

For these purposes, the lord may show the customs he relies upon by old deeds and aged witnesses: he may prove from old grants, deeds, leases, &c., that he and his ancestors have dealt with the land as their own soil and freehold ‡ unencumbered by the right claimed: he may produce an examined copy of the enclosure act, and the award made in pursuance of it, where possession has not been had for twenty years, under the awards; or he may produce a release as to portion of the land over which common is claimed. § Evidence that the cattle of a former tenant of the premises in respect of which the right is claimed have been impounded, will be material evidence to negative the right||; or if the claim be in respect of an ancient house, it will be a good answer to prove that the house was erected within twenty

* *Harding v. Brooks*, 3 Keb. 24.

† *Rotheram v. Green*, Noy, Rep. 67.

‡ *Clarkson v. Woodhouse*, 5 T. R. 412. n.

§ *Rotheram v. Green*, Noy, Rep. 67.

|| 1 Esp. 459.

years, and not upon the site of a former house. * It may also be shown, under the 52d sect. of the General Enclosure Act, that the land in respect of which the right is claimed was an encroachment upon the common.

Owners of common fields may also show a custom to enclose, which, as it is a custom affecting many, may be shown by reputation, from old deeds and writings, and by aged persons, or traditional declarations. †

We have seen that a right of common may be extinguished by unity of possession, and that, after such extinction, the right will not revive by a grant of the same land with common appurtenant, &c. It will be otherwise, however, if the claimant shall prove a grant of all commons *used* therewith. ‡

It must be remembered, however, that where the claim has been made under the Limitation Act, no evidence proving the commencement of a prescriptive or customary right of common will be effectual after a user of thirty years, unless some disability shall have existed during a part or the whole of such thirty years; in which case, the period covered by the disability shall be excluded from the computation. Where the user has existed for sixty years, the right is absolute and

* *Dunstan v. Tresider*, 5 T. R. 2.

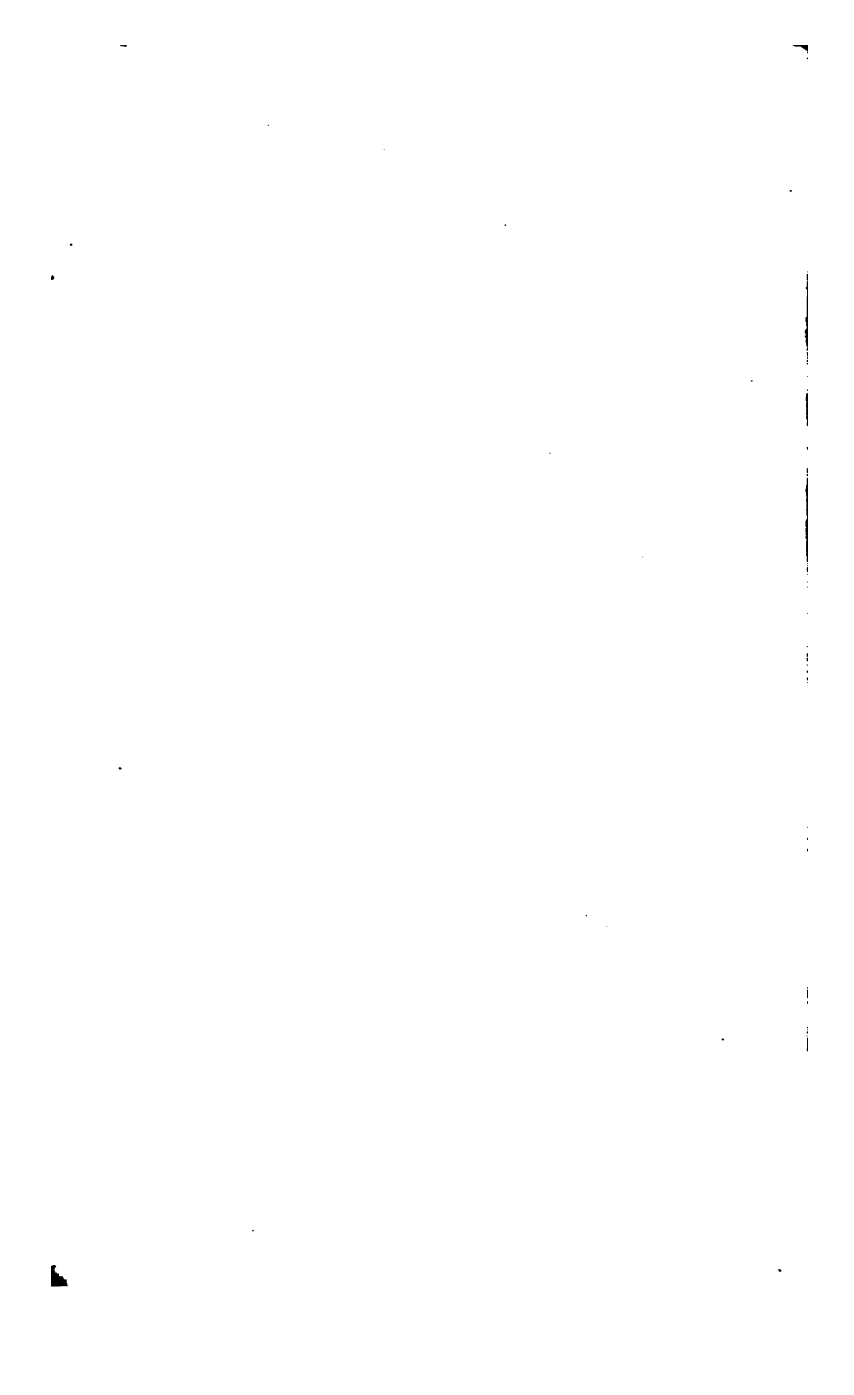
† *How v. Strode*, 2 Wils. 269.

‡ 1 Taunt. 205., 3 Taunt. 24.

indefeasible, unless it shall be proved that the user was had by some consent or agreement, expressly made or given for that purpose by deed or writing.*

Where it is intended to rely upon any circumstance excepting the case from the operation of the Limitation Act, notice of the point so relied upon must be given to the party so claiming.

* Stat. 2 & 3 W. 4. c. 71. ss. 1. 7.



The Act for the Enclosure of Wastes.

8 & 9 VICTORIÆ REGINÆ.

CAP. CXVIII.

An Act to facilitate the enclosure and improvement of commons and lands held in common, the exchange of lands, and the division of intermixed lands; to provide remedies for defective or incomplete executions, and for the non-execution of the powers of general and local enclosure acts; and to provide for the revival of such powers in certain cases. [8th August, 1845.]*

Appointment and Removal of Commissioners.

WHEREAS it is expedient to facilitate the enclosure and improvement of commons and other

* It will be seen from the title to this act that its provisions have four grand divisions:—

First, The enclosure and improvement of wastes.

Secondly, The exchange of lands.

Thirdly, The division of intermixed lands.

Fourthly, The confirmation of enclosures imperfectly made under local or general enclosure acts.

The second and third divisions have little in common with enclosures or rights of common. They supply a

Appointment
of Commis-
sioners.

lands now subject to rights of property which obstruct cultivation and the productive employment of labour, and to facilitate such exchanges of lands, and such divisions of lands intermixed or divided into inconvenient parcels as may be beneficial to the respective owners; and it is also expedient to provide remedies for the defective or incomplete execution and for the non-execution of powers created by general and local acts of enclosure, and to authorize the revival of such powers in certain cases: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that it shall be lawful for one of her Majesty's principal Secretaries of State to appoint any two fit persons to be commissioners under this Act, and at pleasure to remove the commissioners so appointed, or either of them; and upon every vacancy in the office of such commissioner some other fit

remedy, however, for inconveniences long felt, and will be a very general benefit to landowners.

It is now nearly half a century since the objects effected by this act have been contemplated by the legislature. In the year 1801 a committee of the House of Commons sat upon the subject, and they went so far as to prepare the draft of a bill. Their measure was, however, upon examination, found to be quite impracticable. A comparison of that draft with the present act strongly exhibits the difficulties that were to be surmounted and that have been surmounted in the completion of this elaborate measure.

person shall be appointed to such office in like manner; and the commissioners so to be appointed shall, with the first commissioner of her Majesty's woods, forests, land revenues, works, and buildings for the time being, be the commissioners for carrying this Act into execution; and during any vacancy in the office of commissioner under this Act it shall be lawful for the continuing commissioners or commissioner to act as if no such vacancy had occurred.*

II. And be it enacted, that the said first commissioner of her Majesty's woods, forests, land revenues, works, and buildings for the time being shall be the chairman of the commissioners acting in the execution of this Act; and such commissioners shall be styled "The Enclosure Commissioners for *England and Wales*," and shall have their office in *London* or *Westminster*, and they, or any two of them, may sit from time to time, as they deem expedient, as a board of commissioners for carrying this Act into execution; and the commissioners shall cause to be made a seal of the said board, and shall cause to be sealed therewith all awards

Chairman of Commissioners.

Style of Commissioners.

To have a Common Seal.

* The commissioners appointed under the act are, The Right Honourable the Earl of Lincoln (*ex officio* chairman, as First Commissioner of the Woods and Forests, by virtue of the 2d sect.), W. Blamire, Esquire, and George Darby, Esquire. Henry Charles Mules, Esquire, is the secretary to the commission, and the office is at 5. New Street, Spring Gardens.

and orders made or confirmed by the commissioners in pursuance of this Act; and all such awards and orders and other instruments proceeding from the said board, or copies thereof, purporting to be sealed with the seal of the said board, shall be received in evidence, without any further proof thereof; and no award or order of the commissioners under the authority of this Act shall be of any force unless the same shall be sealed as aforesaid.

Yearly Reports to be made.

Commission-
ers to make
annual
Reports:

III. And be it enacted, that the commissioners shall from time to time give to any one of her Majesty's principal Secretaries of State such information respecting their proceedings as such principal Secretary of State shall require, and shall in the month of *January* in every year send to one of the principal Secretaries of State a general report of their proceedings, specifying the applications which may have been made to them under the provisions of this Act, and the several cases in which they shall have authorized enclosures, and the grounds on which they may have withheld their consent to such application, and also the cases in which they shall be of opinion that proposed enclosures, which may not be made without the direction of Parliament, would be expedient; and such report shall

separately distinguish all such proposed enclosures as relate to lands situate within fifteen miles of the city of *London*, and within such respective distances of other cities or towns as herein-after mentioned, and shall state in each such case the special grounds on which they shall be of opinion that such enclosure shall be expedient; and as well in the cases in which they shall have authorized enclosures as in the other cases aforesaid such report shall state the extent of the land authorized and proposed to be enclosed, with such other particulars as herein-after directed; and such report shall also specify the progress which shall have been made in enclosures which the commissioners may have authorized, and in the enclosures which Parliament may have directed to be proceeded with; and every such report shall be laid before both Houses of Parliament within six weeks after the receipt of the same by such principal Secretary of State, if Parliament be sitting, or if Parliament be not sitting, then within six weeks after the next meeting of Parliament; and such commissioners may from time to time send to one of the principal Secretaries of State such special reports in relation to all or any of the matters aforesaid as they may think fit.*

and also special reports.

* This provision appears to have been introduced to enable the commissioners to bring within the provisions

Commissioners to appoint Assistant-Commissioners and Officers.

Power to appoint and remove assistant commissioners, &c.

IV. And be it enacted, that it shall be lawful for the commissioners from time to time to appoint a sufficient number of persons to be assistant-commissioners, and also a secretary, and such clerks, messengers and officers as they shall deem necessary, and to remove such assistant-commissioners, secretary, clerks, messengers, and officers, or any of them, and on any vacancy in any of the said offices to appoint some other person to the vacant office; and the persons so appointed shall assist in carrying this act into execution at such places and in such manner as the commissioners may direct: provided always, that no such appointment shall be made by the commissioners unless the Lord High Treasurer or any three or more of the commissioners of her Majesty's treasury shall in the case of each such appointment consent thereto.

Limitation of Appointments under the Act.

Appointments under this act limited to five years.

V. And be it enacted, that no commissioner or assistant-commissioner, secretary, or other officer or person so to be appointed, shall hold

of the general bill applications made subsequently to their general report, which must be made in the month of January. In practice this will be found very beneficial.

his office for a longer period than five years next after the day of the passing of this Act, and thenceforth until the end of the then next session of Parliament; and after the expiration of the said period of five years and of the then next session of Parliament so much of this Act as authorizes any such appointment shall cease.

*Amount of Salaries of Commissioners and
Officers.*

VI. And be it enacted, that it shall be lawful ^{Salaries and allowances.} for the Lord High Treasurer or Commissioners of her Majesty's treasury to direct a salary, not exceeding one thousand five hundred pounds by the year, to be paid to * one of the commissioners for the time being appointed under this Act; but, except as aforesaid, no salaries shall be paid to the commissioners in respect of their appointments under this Act; and the allowances to the assistant-commissioners, and the salaries of the secretary, clerks, messengers, and other officers to be appointed under this Act, shall be from time to time regulated by the Lord High Treasurer, or the Commissioners of her Majesty's treasury, or any three of them: provided always, that the allowance to an assistant-commissioner shall not exceed the

* George Darby, Esq., is the paid commissioner under this section.

sum of three pounds three shillings for every day he shall be actually employed or travelling in the performance of the duties of his office; provided also, that the said Lord High Treasurer or Commissioners may allow to any commissioner, assistant-commissioner, secretary, clerk, messenger, or other officer such reasonable travelling and other expenses as may be incurred by him in the performance of his duties under this Act, in addition to his salary or allowance (if any) respectively.

Payment of Salaries, &c.

Allowances
and salaries
to be paid out
of the conso-
lidated fund.

VII. And be it enacted, that the allowances and salaries of such commissioner, assistant-commissioners, secretary, clerks, messengers, and officers as aforesaid, and all other incidental expenses of carrying this Act into execution not herein otherwise provided for, shall be paid by the Lord High Treasurer or the Commissioners of her Majesty's treasury out of the consolidated fund of the United Kingdom of *Great Britain and Ireland*.

Declaration to be made by Commissioners.

Commission-
ers and assist-
ant commis-
sioners to
make a de-
claration.

VIII. And be it enacted, that every commissioner shall before he shall enter upon the execution of his office make the following declaration before one of the judges of her Majesty's Courts of Queen's Bench or Common Pleas, or

one of the barons of the Court of Exchequer;
(that is to say,)

‘I do solemnly declare, that I
‘will faithfully, impartially, and honestly, ac-
‘cording to the best of my skill and judgment,
‘execute the powers and duties of a commis-
‘sioner under an act passed in the year
‘of the reign of Queen *Victoria*, intituled [*here*
‘set forth the title of this Act].’

And every assistant-commissioner shall, before he shall enter upon the execution of his office, make the like declaration (substituting the words “assistant-commissioner” for the word “commissioner”) before such judge or baron, or before any two justices of the peace for the county, riding, division, liberty, or jurisdiction wherein such assistant-commissioner shall be resident at the time of his appointment, or before a master extraordinary in her Majesty’s High Court of Chancery; and the appointment of every such commissioner and assistant-commissioner, with the time when and the name or names of the judge, baron, justices, or master extraordinary before whom he shall have made the declaration aforesaid, shall be forthwith published in the *London Gazette*.

Examination of Witnesses and Production of Documents.

IX. And be it enacted, that all awards, apportionments, agreements, writings, and maps Documents of the tithe commissioners may be used.

Power to
summon wit-
nesses.

in the custody of the tithe commissioners for *England* and *Wales* shall be open to the use and inspection of the enclosure commissioners for *England* and *Wales*, or any person by them authorized ; and such copies of or extracts from such awards, apportionments, agreements, writings, and maps as the commissioners shall require shall be furnished to them for the purposes of this act ; and that the commissioners or any assistant-commissioner may, by summons under the seal of the commission or under the hands of such assistant commissioner, require the attendance of all such persons as they or he may think fit to examine upon any matter relating to any enclosure or proposed enclosure, or other proceeding under the authority of this Act, and also make any inquiries and call for any answer or return as to any such matter, and also administer or receive declarations, and examine all such persons upon declaration, and cause to be produced before them or him, upon declaration, all court rolls, and all rate books, instruments of tithe apportionment, and other public writings, maps, plans, and surveys of or belonging to any parish, or copies thereof respectively, in anywise relating to any such matter ; and the commissioners may, when they shall think fit, by summons under the seal of the commission require the attendance before any valuer acting in the matter of an enclosure under this Act of all such persons as the valuer

may certify to the commissioners as persons whose testimony may be necessary for the matter of such enclosure, and cause to be produced before such valuer, upon declaration, all such court rolls *, rate books, public writings †,

* In order to prove the title of a copyholder, the court rolls may be produced, or copies of them may be given in evidence, *Doe v. Hale*, 16 East, 208., the handwriting of the steward being proved; but where an admittance is more than thirty years old, proof of the signature of the steward is unnecessary. *Dean and Chapter of Ely v. Stewart*, 2 Atk. 45.; but see *Duke of Somerset v. Franco*, Fortescue, 43. In one case *Holt C. J.* ruled that the rough draught of the steward of the manor was good evidence. *Anon.* 1 Ld. Byron, 735., 6 B. & C. 495.

And it has been held, that a surrender and presentment may be proved by a draft of an entry produced from the muniments of the manor; and the parol testimony of the foreman of the homage jury who made such presentment. *Doe v. Calloway*, 6 B. & C. 484.

† As to the effect of court rolls, whether they be of the court baron or customary court, they are evidence between the lord of the manor and his tenants or copyholders, B. & P. 247.; 1 Phil. Ev. 397.; and ancient writings not properly court rolls, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been made *assensu omnium tenentium*, have been admitted as evidence to prove the course of descent of lands in the manor. *Denn v. Spray*, 1 T. K. 466. So an entry on the court rolls of a manor, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved. *Roe v. Parker*, 5 T. R. 26.; and see *Doe v. Askew*, 10 East, 520. Parchment writings preserved among the muniments of a manor, dated in 1698 and 1717, purporting to be signed by certain copyholders of the manor, stating an unlimited right of common in the copyholders, have been held to be evidence of the reputation of the manor at the time as to a prescriptive right of common set up by the defendant. *Chapman v.*

maps, plans, and surveys, or copies thereof, as aforesaid; and every valuer acting in the matter

Cowlan, 13 East, 10. Presentments are not evidence of matters not within the jurisdiction of the homage. *Richards v. Bassel*, 10 B. & C. 657. Entries in the books of the clerk of the peace of deputations many years since granted to gamekeepers by the owner of a manor are evidence to show that the party there mentioned exercised the right of appointing gamekeepers, by applying to the clerk of the peace to get certificates, without production of the deputations themselves. *Hunt v. Andrews*, 3 B. & A. 341.; *Rushworth v. Craven*, 1 M'C. & Y. 417.

Corporation books are allowed to be given in evidence when they have been publicly kept as such, and when the entries have been made by the proper officer, *R. v. Mothersele*, 1 Str. 92. A book kept by a prosecutor's clerk, who was not an officer of the corporation, containing minutes of corporate proceedings, but which had not been kept as the public book of the corporation, was rejected in evidence. *Ibid.* If the books are ancient, it must be shown that they come from the proper custody of the clerk, as from a chest that has always been in the custody of the clerk of the corporation, *Mercers of Shrewsbury v. Hart*, 1 Carr & P. 114.; it is not sufficient if they are brought from a chest found in the house of a former clerk after his death. *Ibid.*

An old terrier or survey is not in general admissible in evidence without proof of its having come from the proper repository, 1 Stark. Ev. 170. So an old grant to an abbey contained in a manuscript, entitled "*Secretum Abbatis*," in the Bodleian Library, was rejected, as not coming from the proper repository, *Michael v. Rabbetts*, cited 3 Taunt. 91. So an ancient grant to a priory, from the Cottenham Manuscripts in the British Museum, was rejected, it not appearing that the possession of the grant was connected with any person having an interest in the estate; *Swinerton v. Marquis of Stafford*, 3 Taunt. 91.

On an issue to try the boundaries of two parishes, an old terrier or map of the limits drawn in an inartificial manner, brought from a box of old papers relating to

of an enclosure under this Act may also administer or receive declarations, and examine upon declaration * all such persons as shall

the parish, in the possession of the representatives of the rector, was rejected, it not being signed by any person bearing a public character or office in the parish, Earl v. Lewis, 4 Esp. 3.

* The declaration may be in the following form :—

“ I, A. B., do solemnly declare that the evidence I shall give before you, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth.”

By the 144th sect. any person giving false evidence, or withholding or destroying any document, or refusing to attend or give evidence, shall be deemed guilty of a misdemeanour.

The summons should be personally served, and may be in the following form :—

“ To A. B. of _____, in the county of _____, I, A. B., one of the assistant commissioners acting in the execution of an act passed in a session of parliament held in the 8th and 9th years of the reign of her present Majesty, entitled ‘ An Act to facilitate the enclosure and improvement of commons and lands held in common, the exchange of lands and division of intermixed lands ; to provide remedies for defective or incomplete executions, and for the non-execution of the powers of general and local enclosure acts ; and to provide for the revival of such powers in certain cases ;’ do hereby, by virtue of the powers by the said act conferred, require you personally to be and appear before me at _____, in the county of _____, on _____, the _____ day of _____, at the hour of _____ in the _____ noon of the same day, then to be examined and to testify all those matters and things which you shall know of, and concerning all matters pertaining to the common of [*describe the land to be enclosed*], or to the rights of the commoners or the lord, or to the expediency of the enclosure thereof [*vary this language to meet the circumstances of the case*], and I hereby also require you to produce, or cause to be produced, before me at the time and place last appointed [*describe the parti-*

attend before him under such summons of the commissioners, and all such persons as may voluntarily attend before him as witnesses in such matter: provided always, that no such person shall be required to attend in obedience to any such summons unless the reasonable charges of his attendance shall have been paid or tendered to him; and no such person shall be required in any case, in obedience to any such summons, to travel more than ten miles from the place of his abode.

Delegation of Powers to Assistant Commissioners.

Commissioners may delegate powers to assistant commissioners.

X. And be it enacted, that the commissioners may delegate to the assistant commissioners,

cular document the production of which is required]; and herein fail not, as you will be liable to be indicted for a misdemeanour.

Witness my hand this day of 184 ."

Signature of Assistant Commissioner.

This summons must be served a reasonable time before the meeting; and if the production of documents be required, time must be allowed to enable the party to make effectual search. Chit. Sum. Prac. 178.

A witness served with this summons, *duces tecum*, must be ready to produce the writings in his possession, if ordered, *Amy v. Long*, 9 East, 473.; but if the production would have a tendency to subject him to a criminal charge, or to a penalty or forfeiture, a judge — and therefore an assistant-commissioner or valuer — will excuse the non-production. See *Whitaker v. Izod*, 2 Taunt. 115. So, if he state that they are his title-deeds, judges have always refused to compel him to produce them. Per. Cur. *Pickering v. Noyes*, 1 B. & C. 263.; and see *R. v. Upper Boddington*, 3 D. & R. 726.

or to any one or more of them, such of the powers hereby given to the commissioners as the commissioners shall think fit (except the power to confirm awards, or to do any act herein required to be done under the seal of the commissioners), and the power so delegated shall be exercised under such regulations as the commissioners shall direct; and the commissioners may at any time recall or alter all or any of the powers delegated as aforesaid, and, notwithstanding the delegation thereof, may act as if no such delegation had been made; and all acts done by any such assistant commissioner in pursuance of such delegated power shall be obeyed by all persons as if they had proceeded from the commissioners, and the non-observance thereof shall be punishable in like manner.

*What Lands are subject to be enclosed under this Act.**

XI. And be it enacted, that all such lands as are hereinafter mentioned; (that is to say,) all lands subject to any rights of common

Descriptions of land subject to be enclosed under this act.

* This section appears to include every kind of waste upon which no severalty right attaches, whilst it also enumerates every kind of commonable land upon which severalty rights do exist for a longer or shorter period of each year. It provides also for the case of stinted pastures and commonable woodlands. It seems generally to include every class of lands subject to rights of common, or to any right which can interfere with the free cultivation of the soil.

whatsoever, and whether such rights may be exercised or enjoyed at all times, or may be exercised or enjoyed only during limited times, seasons, or periods, or be subject to any suspension or restriction whatsoever in respect of the time of the enjoyment thereof; all gated and stinted pastures in which the property of the soil or of some part thereof is in the owners of the cattle gates or other gates or stints, or any of them; and also all gated and stinted pastures in which no part of the property of the soil is in the owners of the cattle gates or other gates or stints, or any of them; all land held, occupied, or used in common, either at all times or during any time or season, or periodically, and either for all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds or otherwise distinguishable; all land in which the property or right of or to the vesture or herbage, or any part thereof, during the whole or any part of the year, or the property or right of or to the wood or underwood growing and to grow thereon, is separated from the property of the soil; and all lot meadows and other lands the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise, shall be land subject to be enclosed under this act.

Common Lands not to be enclosed without Authority of Parliament, nor Sea Embankments made without Consent of the Admiralty.

XII. Provided always, and be it enacted, that no waste land of any manor on which the tenants of such manor have rights of common, nor any land whatsoever subject to rights of common which may be exercised at all times of every year for cattle levant and couchant upon other land, or to any rights of common which may be exercised at all times of every year, and which shall not be limited by number or stints, shall be enclosed under this Act without the previous authority of Parliament * in each particular case, as herein-after provided; provided also, that neither this Act, nor any thing which may be done under or by virtue thereof, shall authorize to be made any embankment, erection, or encroachment, without the consent of the commissioners for executing the office of Lord High Admiral of the United Kingdom of *Great Britain and Ireland*, and where the consent of any grantee of the office of admiral or vice-admiral might have been required by law if this Act had not been passed, the consent also of

Wastes of manors and lands subject to indefinite common rights at all times not to be enclosed without previous direction of parliament.

* The distinction is, that all lands upon which severalty rights attach may be enclosed by the authority of the commissioners; waste lands upon which there are no severalty rights must be reserved for parliament.

such grantee, in or upon the shore of any harbour, or the bank of any navigable river so far as the tide flows up the same, or shall give to or confer upon any person any right, title, estate, or interest to or in any such embankment, erection, or encroachment already made other than what he may legally have at the time of the passing of this Act, or confer upon any person whatsoever any right, title, estate, or interest whatsoever in any lands or soil whereon the tide of the sea flows and re-flows.

Act does not apply to the New Forest or to the Forest of Dean.

New Forest
and Forest of
Dean ex-
cepted.

XIII. Provided also, and be it enacted, that no part of the *New Forest* in the County of *Southampton*, or of the Forest of *Dean* in the county of *Gloucester*, shall be land subject to be enclosed under this Act.

*Lands in the Neighbourhood of large Towns.**

Land within
certain dis-
tances of
large towns

XIV. Provided also, and be it enacted, that no lands situate within fifteen miles of the

* This section applies to all the species of lands comprised under the 11th section, and renders the assent of parliament necessary not only to the enclosure of common lands in the neighbourhood of towns, but also of shack lands and stinted pastures. It is difficult to conceive why the inclosure of shack and stinted pastures should be reserved, since, although the public may be

city of *London*, or within two miles of any city or town of ten thousand inhabitants, or within two miles and a half of any city or town of twenty thousand inhabitants, or within three miles of any city or town of thirty thousand inhabitants, or within three miles and a half of any city or town of seventy thousand inhabitants, or within four miles of any city or town of one hundred thousand inhabitants, shall be subject to be enclosed under the provisions of this Act without the previous authority of Parliament in each particular case, as herein-after provided; and in all such cases the number of inhabitants shall be ascertained by the then last parliamentary census thereof, and that the distance shall be measured in a direct line from the town hall, if there shall be any town hall, or if there shall be no town hall then from the cathedral or church, if there shall be only one church, or if there shall be more churches than one then from the principal market place of any such city or town.

not to be enclosed without the previous direction of parliament.

Village Greens.

XV. And be it enacted, that no town green or village green shall be subject to be enclosed

Village greens not to be enclosed; but provision

considered to have acquired some interest in commons (and these are expressly reserved for the consideration of parliament by the 12th sect.), the public can scarcely have any interest in the cultivated fields which are the subject of shack.

may be made
for preserving
the surface
and fixing
boundaries.

under this Act; provided that in every case in which an enclosure of lands in the parish in which such town green or village green may be situate shall be made under the authority of this Act, it shall be lawful for the commissioners if they shall think fit, to direct that such town green or village green, provided such green be of equal or greater extent, be allotted to the churchwardens and overseers of the poor of such parish, in trust to allow the same to be used for the purposes of exercise and recreation, and the same shall be allotted and awarded accordingly, in like manner, and with the like provisions for making or maintaining the fences thereof, and preserving the surface thereof, and draining and levelling the same where occasion shall require, as herein-after directed concerning the allotments to be made for the purposes of exercise and recreation; and such green may be so allotted in addition to other land which may be allotted for the purposes of exercise and recreation, or, if the commissioners shall think it sufficient, may be allotted in substitution for other land which might have been required to be allotted for such purposes; and in every case in which such town green or village green shall adjoin land subject to be enclosed under this Act, and shall not be separated from such land by fences or known bounds, the commissioners shall, in the provisional order concerning such enclosure, set out a boundary

line between such green and the adjoining land, and shall in their annual general report mention and describe such boundary.

Who shall be deemed Landowners or interested in Lands.*

XVI. And be it enacted, that for the purposes of this Act the persons interested in land subject to be enclosed under this Act, or otherwise subject or to become subject to the provisions of this Act, shall be deemed to be the

Persons interested in lands for purposes of applications, &c.

* The parties who are not to be deemed to be parties interested for the purposes of this Act are—

Tenant for life or lives, or years, holding at a rent of two thirds the value.

Tenant for a term of years originally not exceeding fourteen.

Tenants from year to year.

Tenants at will.

In these cases the persons entitled in reversion immediately expectant will vote.

In the next class of cases the payer and receiver of the rent will have a joint vote; viz. —

Tenants for life, or lives, or for a term of years originally exceeding fourteen, paying a rent less than two thirds the value.

In the third class the person in possession and person dispossessed have a joint vote; viz.: —

Where a person is in possession under a writ of execution, or receives under an order of a Court of Equity.

Saving these classes of exceptions, persons in actual possession or enjoyment, or receipt of rents and profits, shall be deemed to be the parties interested.

It is by no means difficult to imagine cases of great intricacy and difficulty that may arise under this section.

persons herein-after mentioned, and no others; (that is to say,) the persons who shall be in the actual possession or enjoyment of any such land or any part thereof, or any common or common right thereon, or any manor of which such land or any part thereof shall be waste, or who shall be in the actual receipt of the rents and profits of such land, or part thereof, common or common right, or manor respectively, (except any tenant for life or lives, or for years, holding under a lease or agreement for a lease on which a rent of not less than two thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof, and except any tenant from year to year at will or sufferance,) and that without regard to the real amount of interest of such persons; and in every case in which any such land, common, or common right, or manor, shall have been leased or agreed to be leased to any person or persons for life or lives or for years by any lease or agreement for a lease on which a rent of not less than two thirds of the clear yearly value of the premises comprised therein shall have been reserved; and in every case in which any such land, common, or common right, or manor, shall be in the possession of a tenant from year

to year at will or sufferance, or shall have been leased or agreed to be leased for a term which shall not have exceeded fourteen years from the commencement thereof, the person who shall for the time being be entitled to the said land, common, or common right, or manor, in reversion immediately expectant on the term created or agreed to be created by such lease or agreement for a lease respectively, or subject to the tenancy from year to year at will or sufferance, shall be deemed for the purposes of this Act to be the person interested as aforesaid in respect of such land, common, or common right, or manor; and in every case in which any such land, common, or common right, or manor, as aforesaid, shall have been leased or agreed to be leased to any person for life or lives or for years by any lease or agreement for a lease in which a rent less than two thirds of the clear yearly value of the premises comprised therein shall have been reserved, and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall for the time being be in the actual receipt of the rent reserved upon such lease or agreement for a lease shall, jointly with the person who shall be liable to the payment of such rent of such land, common, or common right, or manor, be deemed for the purposes of this Act to be the person interested in respect of such land, common, or common right, or manor respectively;

and in every case in which any person shall be in possession or enjoyment or receipt of the rents or profits of any such land, common, or common right, or manor, under any sequestration, extent, elegit, or other writ of execution, or as a receiver under any order of a court of equity, the person who but for such writ or order would have been in possession, enjoyment, or receipt of the rents and profits, shall, jointly with the person in possession, enjoyment, or receipt by virtue of such writ or order, be deemed for the purposes of this Act to be the person interested in respect of such land, common, or common right, or manor respectively.

Crown Lands.

Where the crown is interested, who shall be substituted.

XVII. And be it enacted, that whenever her Majesty shall be interested in land as aforesaid the first commissioner of her Majesty's woods, forests, land revenues, works, and buildings for the time being, or in case her Majesty shall be so interested in right of the duchy of *Lancaster*, the chancellor of the duchy of *Lancaster* shall for the purposes of this Act, and to the extent of such respective interest, be substituted for the person interested as aforesaid.

Where Duke of Cornwall is interested, who shall be substituted.

XVIII. And be it enacted, that whenever the Duke of *Cornwall* shall be interested in land as aforesaid the lord warden of the stan-

naries shall for the purposes of this Act, and to the extent of such interest, be substituted instead of the person interested as aforesaid.

Joint Tenants.

XIX. And be it enacted, that whenever an interest in land according to the provisions of this Act shall be vested in several persons as co-trustees or in joint tenancy, such persons shall for the purposes of this Act be considered as jointly interested, and entitled to one vote only in respect of their joint interest; but any one or more of such persons may, unless the other or others of them shall dissent therefrom, act or vote under this Act; and the majority in number of any such persons may, notwithstanding any dissent of the minority, act or vote under this Act in the same manner as if all such persons had concurred; and whenever several persons as tenants in coparcenary or in common shall be so interested, each coparcener or tenant in common shall for the purposes of this Act, and to the extent of the value of his respective undivided share, be deemed separately interested and entitled to vote as if he were tenant in severalty.

Incapacitated Persons.

XX. And be it enacted, that whenever any person interested in land as aforesaid shall be

Provision for
persons
jointly inter-
ested.

In case of dis-
ability, com-

missioners to
name sub-
stitutes.

an infant, lunatic, idiot, feme covert, or under any other legal disability, or beyond the seas, the guardian, trustee, committee of the estate, husband, or attorney respectively, or in default thereof such person as may be nominated for that purpose by the commissioners, and whom they are hereby empowered to nominate under their hands and seal, shall for the purposes of this Act be substituted in the place of such person so interested.

Appointment of Attornies.

Attornies
may be ap-
pointed by
persons
interested.

XXI. And be it enacted, that it shall be lawful for any person interested in any land subject to be enclosed under this Act, or otherwise subject or to become subject to the provisions of this Act, by a power of attorney, given in writing under his hand, to appoint an agent to act for him for the purposes of this Act; and all things which by this Act are directed to be done by or with relation to any such person may be lawfully done by or with relation to the agent so duly authorized of such person; and every such agent shall have full power, in the name and on behalf of his principal, to sign, concur in, and execute any application or act, to signify consent or dissent, and to vote on any question arising out of the execution of this Act; and every person shall be bound by the acts of any such agent, ac-

cording to the authority committed to him, as fully as if the principal of such agent had so acted; and the power of attorney under which the agent shall have acted, or a copy thereof, authenticated by the signature of a witness or witnesses, shall be deposited in the office of the commissioners; and any such power of attorney may be in the form following:

' I of do hereby ^{Form of}
' appoint of to be ^{power of}
' my attorney for all the purposes of an Act ^{attorney.}
' passed in the years of her present
' Majesty, intituled .'

*Poor Rate Assessments to be used where possible,
for estimating the Interest of Owners.*

XXII. Provided always, and be it enacted, that the proportional value of the respective interests of the several persons interested in any land subject to be enclosed under this Act, or otherwise subject or to become subject to the provisions of this Act, shall, so far as relates to the power to sign any application, or to give any notice or consent, or to vote at any meeting under this Act, be estimated as herein-after mentioned; (that is to say,) where their interests shall be in respect of land or other rateable property, then according to the proportional sums at which such land or rateable

property shall be rated to the relief of the poor*; and when their interests shall be in respect of rights of common enjoyed or claimed in respect of any land, and not defined by numbers or stints, then according to the proportional sum at which the land in respect of which they enjoy or claim such rights of common shall be rated to the relief of the poor; and in case such interests shall be in respect of rights in a gated or stinted pasture, or of other rights defined by numbers or stints, then according to the proportional amount of their respective numbers or stints; but in case such interests shall be in respect of rights of common in gross, not rated to the relief of the poor, and not defined by numbers or stints, or in case, from any other cause, it shall appear to the commissioners, or to the assistant commissioner presiding at any meeting held for the purposes of this Act, impracticable to estimate such proportional value in manner aforesaid, it shall be lawful for the commissioners or such assistant commissioner to direct in what manner such proportional value shall be estimated, regard being had to the circumstances of each par-

* Where the right claimed is appendant or appurtenant, the proportionate rate must be estimated by the rental of the old enclosure to which the right is either appendant or appurtenant, as the right itself is not subject to be rated. A common right in gross is a tenement liable to be rated; as is also a stinted pasture. See *antè*, p. 36.

ticular case: provided always, that in every case in which such assistant commissioner shall have directed in what manner such proportional value shall be estimated under the power herein-before contained he shall specially report to the commissioners the circumstances under which it shall have become necessary to exercise such power, and the directions he shall have given in the exercise thereof.

XXIII. And be it enacted, that the proportional value of the interest of the lord of a manor interested as lord in any land subject to be enclosed under this Act, or, in case there shall be several lords of a manor or lords of several manors so interested in any land subject to be enclosed under this Act, the proportional value of the respective interests of such lords shall for the purposes aforesaid be estimated in such manner as the commissioners may direct.

Proportional
interests of
lords of
manors.

*Commissioners shall print and circulate Forms.**

XXIV. And be it enacted, that the commissioners shall frame, and cause to be printed and circulated as they shall see occasion, forms indicating the particulars of the information to be furnished to the commissioners by persons

Commission-
ers to frame
forms of ap-
plications, &c.

* The forms sanctioned by the commissioners will be found in the appendix.

proposing to enclose land under the provisions of this Act, with reference to the extent and nature of the land to be enclosed, to the mines, minerals, or valuable strata (if any) under the same, to the questions of boundary (if any) concerning such land, or such mines, minerals, or strata, to the numbers and occupations of the inhabitants of the parish or place, to its vicinity to or distance from any city or town or populous district, to the parties interested in the proposed enclosure, and the numbers who have assented to or dissented from the application, to the nature of the rights which require the intervention of the commissioners or the interference of Parliament, to the supposed advantages of the proposed enclosure, to the allotments (if any) proposed to be made for exercise and recreation and for the labouring poor, and to the allotment (if any) agreed on or proposed to be made to the lord of the manor, in case the lord of the manor shall be entitled to the soil of the land proposed to be enclosed, in respect of his right and interest therein, and such other information as in the judgment of the commissioners may assist them in forming an opinion on such application, and also such other forms as the commissioners may deem requisite or expedient for facilitating proceedings under this Act.

PRELIMINARY MEETING.

Upon Application by One Third in Value Assistant Commissioners to hold a Meeting, to inquire into Expediency of Enclosure and hear Objections.

XXV. And be it enacted, that any persons interested in land subject to be enclosed, and proposing to enclose the same under this Act, may make application to the commissioners according to the form which may have been circulated as aforesaid by the commissioners to sanction such enclosure, or to certify in their annual general report the expediency of such enclosure, as the case may require; and in case the commissioners shall, on the statements contained in such application, think that the enclosure of such land, or of some part thereof, may be found to be expedient, they shall refer such application to an assistant commissioner, who shall inspect the land proposed to be enclosed, and inquire into the correctness of the statements in such application, and otherwise into the expediency of the proposed enclosure; and such assistant commissioner shall hold a meeting or meetings, to hear any objections which may be made to the proposed enclosure, and any information or evidence which may be offered in relation thereto, and may adjourn

Upon application to the commissioners, an assistant commissioner to inquire into the expediency of proposed enclosure.

such meetings respectively, and shall cause notice to be given on the church door of the parish in which the land proposed to be enclosed, or the greater part thereof, shall be situate, and also a like notice to be given by advertisement of the time and place of every such meeting, fourteen days at least before every such meeting (meetings by adjournment only excepted): provided nevertheless, that it shall not be lawful for the commissioners to refer such application to the assistant commissioner, nor for the assistant commissioner to take any further proceedings upon any such application, unless it shall be made to appear to them or him respectively that the persons making such application represent at least one third in value of the interests in the lands therein proposed to be enclosed.*

* By this provision the commissioners are ousted from all jurisdiction until the application has received the signatures of one third of the interest in the waste.

It may be noted here that if the application be properly made by one third of the interest in the waste, and the applicants should afterwards fail in obtaining the consent of two thirds to the provisional order of the commissioners, the expenses of the commission fall upon the consolidated fund: as by sect. 130. the commissioners have power to levy rates for expenses only where an enclosure has actually taken place.

Assistant Commissioners to report whether Enclosure should take place, and if so, upon what Terms.

XXVI. And be it enacted, that the assistant commissioner to whom such application shall be referred shall report in writing to the commissioners the result of his inquiries as to the statements contained in the application, and his opinion as to the expediency or in expediency of the proposed enclosure, with the reasons for such opinion; and in case he shall think such enclosure expedient, he may specify any terms or conditions which may appear to him to be proper for the protection of any public interests, and of any mineral property or peculiar rights in relation to the land proposed to be enclosed, and shall annex to his report a map or sketch of the land proposed to be enclosed, and in case he shall be of opinion that allotments for exercise and recreation or for the labouring poor should be made in the proposed enclosure, such sketch shall show the place in which it shall appear to him that such allotments should be made.

Assistant
commissioner to
report on
application.

PROVISIONAL ORDER.

Commissioners to make Provisional Order — to contain Terms and Conditions of Enclosure — to be deposited in the Parish — Meeting to be held to ascertain Interests and collect Assents — Two Thirds necessary — Consent of Cities and Towns how to be obtained.*

Commissioners to embody the conditions of proposed enclosure in a provisional order, and to take consents of parties interested.

XXVII. And be it enacted, that if on the report of the assistant commissioner, or after any further inquiries they shall think necessary in relation thereto, the commissioners shall be of opinion, having regard as well to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, or populous places in or near any parish in which the land proposed to be enclosed or any part thereof shall be situate, as to the advantage of the proprietors of the land to which such application shall relate, that the proposed enclosure would be expedient, the commissioners, by provisional order under their seal, shall set forth the terms and conditions on which they shall be of opinion that the enclosure should be made, and especially the quantity and situation of the

* No form of a provisional order has yet been issued by the commissioners, nor is it intended by them that any general form shall be adopted. They conceive that the form will vary according to the particular circumstances of each case.

allotments (if any) which under the provisions of this act should be appropriated for the purposes of exercise and recreation and for the labouring poor, and, in case the lord of the manor shall be entitled to the soil of the land proposed to be enclosed, shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses, in case the expenses shall, under the provisions herein-after contained, be so directed to be paid by sale of land; and after deducting the allotments to be made for public purposes, should be allotted to the lord of the manor in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of such lord in the land to be enclosed, as the case may appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed, and in case there shall be any mineral property, or any rights in relation thereto, not vested in the lord of the manor, or other rights which shall appear to the commissioners proper to be specially provided for* upon

* These words, it is submitted, will enable the commissioners to make equitable arrangements in favour of

such enclosure, or to be excepted from the operation thereof, shall specify the provisions or exceptions which should be made in that behalf; and the commissioners shall thereupon cause notice to be given of their intention to authorize the proposed enclosure, or (as the case may be) to certify in their annual general report the expediency of the proposed enclosure, but upon the terms and conditions in such order expressed, and in case the consents required by this Act should be given within the time in such notice specified, or within any enlarged time which the commissioners may allow for that purpose; and the commissioners shall cause to be deposited for inspection a copy of such provisional order in the parish or place in which the land proposed to be enclosed, or some part thereof, shall be situate, and may, in case they shall think fit, cause meetings to be holden by an assistant commissioner for the purpose of taking consents or dissents, or of ascertaining the interests of consenting or dissenting parties, or give such directions as to the mode of taking and verifying consents as they shall think fit; and in case it shall appear to the

a class of persons not otherwise protected by the act; namely, the holders for more than twenty years of small encroachments, who have paid inconsiderable sums as acknowledgments to the lord and the commoners, or one of them. These are not protected by the 52d sect., but there can be no doubt that the commissioners will exert in their favor the equitable jurisdiction conferred by this clause.

satisfaction of the commissioners that persons the aggregate amount of whose interests in the land proposed to be enclosed shall not be less in value than two thirds of the whole interest in such land, and the other persons, if any, whose consents may be necessary under the provisions herein-after contained, shall have consented to such enclosure, upon the terms and conditions in such order expressed, then, if the land proposed to be enclosed cannot be enclosed under this Act without the previous direction of parliament, the commissioners shall in their next annual general report certify their opinion that the proposed enclosure would be expedient, with such particulars in relation thereto, or to the terms and conditions aforesaid, as they shall think necessary; and in case the land proposed to be enclosed shall be land to the enclosure of which under this Act the previous direction of parliament is not hereby required, the commissioners shall cause notice to be given on the church door and by advertisement of their intention to proceed with such enclosure under the provisions herein contained: provided always, that where the freemen, burgesses, or inhabitant householders of any city, borough, or town, shall be entitled to rights of common or other interests in the land proposed to be enclosed, the commissioners shall not certify the expediency of the proposed enclosure, or proceed further under this Act, unless it shall

appear to the commissioners that two thirds in number of such of the freemen and burgesses so entitled as may be resident in such city, borough, or town, or within seven miles thereof, or of such inhabitant householders, as the case may be, shall have consented to such enclosure, on the terms and conditions in their provisional order specified; and in case two thirds in number of such resident freemen and burgesses, or of such inhabitant householders, shall have so consented, such consent shall be deemed the consent of the class of freemen, burgesses, or inhabitant householders, as the case may be, so entitled.*

Where Two separate Tracts of Land are joined in One Application, Two Thirds of the Interest in each Tract must assent.

Separate applications for separate tracts.

XXVIII. And be it enacted, that when it shall appear to the commissioners that land proposed to be enclosed under this Act shall be in part a tract of open and common arable, meadow, or pasture lands or fields, and in part a tract of common or waste lands subject to rights of common, or shall otherwise consist of

* The assenting parties must be, not mere claimants, but persons in actual enjoyment of a legal right. The user of inhabitants, as such, will not be, it is submitted, a sufficient interest to render their consent necessary under this section; but see *antè*, pp. 24. 78., and note to sect. 54. *post*.

separate and distinct tracts subject to separate and distinct rights or classes of rights, and the persons interested in one of such tracts shall not be all interested in the other of them, it shall be lawful for the commissioners to ascertain whether persons interested in each of such tracts whose interests shall not be less than two thirds in value of the whole interest therein shall consent to the proposed enclosure, on the terms and conditions in their provisional order specified; and in case it shall thereupon appear that such proportion in value of the persons interested in any such tract as aforesaid shall not have consented, the said commissioners shall not proceed further under this Act in respect of such tract, or certify in their annual general report the expediency of the enclosure thereof, unless or until persons interested therein whose interest shall not be less than two thirds shall have consented thereto.

Veto given to Lord of the Manor.

XXIX. Provided always, and be it enacted, that when the land to which such application shall relate shall be the waste of any manor, or land within any manor to the soil of which the lord of such manor shall be entitled in right of his manor, then, unless there shall be more than one person interested in such manor, according to the definition of this Act, the com-

Consent of
the lord of
the manor.

missioners shall not proceed to an enclosure on such application, or certify in their annual general report the expediency thereof, unless the person interested in the land subject to be enclosed as aforesaid in right of such manor, or his substitute under this Act, shall consent to such enclosure; and where there shall be more than one person interested in such manor the commissioners shall not proceed to an enclosure, or certify as aforesaid the expediency thereof, in case such persons, or the majority of such persons in respect of interest, shall signify their dissent within the time limited by the commissioners.

ALLOTMENTS TO PARTIES HAVING NO
INTEREST IN THE COMMONS.

To Inhabitants of the Neighbourhood, for Exercise and Recreation.

Allotments for exercise and recreation may be required as conditions of enclosure.

XXX. And be it enacted, that in the provisional order of the commissioners concerning the enclosure under the provisions of this Act of any waste land of any manor on which the tenants of such manor have rights of common, or of any other land subject to rights of common which may be exercised at all times of the year for cattle levant and couchant, or to any rights of common which may be exercised at all times of the year, and which shall not be

limited by number or stints, it shall be lawful for the commissioners to require, and in their provisional order to specify, as one of the terms and conditions of such enclosure, the appropriation of an allotment for the purposes of exercise and recreation for the inhabitants of the neighbourhood, not exceeding the quantity herein-after mentioned applicable to each case; that is to say, where the land to be enclosed shall be situate in any parish the population of which according to the then last previous parliamentary census shall amount to or exceed ten thousand persons, ten acres; where the land to be enclosed shall be situate in any parish the population of which according to such census shall amount to or exceed five thousand persons and be less than ten thousand persons, eight acres; and where the land to be enclosed shall be situate in any parish the population of which according to such census shall amount to or exceed two thousand persons and be less than five thousand persons, five acres; and in every case, except as aforesaid, not exceeding four acres; and if in the provisional order for such enclosure the commissioners shall not have required the appropriation of an allotment for the purposes of exercise and recreation, the commissioners shall in their annual general report state the grounds on which they shall have abstained from requiring such appropriation.

For labouring Poor.

Allotments
for labouring
poor.

XXXI. And be it enacted, that in the provisional order of the commissioners concerning the enclosure under the provisions of this Act of any waste land of any manor on which the tenants of such manor have rights of common, or of any land whatsoever subject to rights of common which may be exercised at all times of the year for cattle levant and couchant, as aforesaid, or to any rights of common which may be exercised at all times of the year, and which shall not be limited by number or stints, it shall be lawful for the commissioners to require and specify as one of the terms and conditions of such enclosure the appropriation of such an allotment for the labouring poor as the commissioners shall think necessary, with reference to the circumstances of each particular case, such allotment, nevertheless, to be subject to a rent-charge, to be payable thereout to any person or persons who may be entitled to allotments under such enclosure as herein-after provided; and if in the provisional order for such enclosure the commissioners shall not have required the appropriation of an allotment for the labouring poor, the commissioners shall in their annual general report state the grounds on which they shall have abstained from requiring such appropriation.

GENERAL SESSIONAL ACT.

XXXII. And be it enacted, that in case by any act of parliament hereafter to be passed it shall be enacted that the enclosures the expediency of which shall have been certified by the commissioners in their annual general report as aforesaid, or any of them be proceeded with, the same shall in every case be proceeded with and completed according to the provisions of this Act, and on the terms and conditions in the provisional order of the commissioners specified in that behalf; and every such act of parliament hereafter to be passed containing such enactment as aforesaid shall be deemed a public general act.*

Acts for the enclosure of lands in pursuance of the reports of the commissioners to be deemed public general acts.

THE VALUER.

Appointment of Valuer.

XXXIII. And be it enacted, that as soon as conveniently may be after the passing of any act of parliament by which any enclosure

Meeting for appointing valuer.

* This public general act will, it is submitted, authorise *eo nomine* the enclosure of those wastes which the commissioners shall report in favour of, supposing that the legislature assents to their report. The act will be a public act, one which imposes no expense or necessity for exertion on the landowners or commoners. The chief excellence of the statute before us seems to be, that at a very trifling expense — that of an application to the commissioners, and of a meeting before an assistant commissioner, for the purpose of satisfying the commissioners as to the expediency of the enclosure, and

shall be directed to be proceeded with under the provisions of this Act, or (in the case of land subject to be enclosed under this Act without the previous direction of parliament) as soon as conveniently may be after the expiration of thirty days from the publication by the commissioners of the notice of their intention to proceed with an enclosure under this Act, the commissioners shall call a meeting of the persons interested in the land to be enclosed, of which twenty-one days' notice shall be given by advertisement, to be held for appointing a valuer to divide, set out, and allot such land, or so much thereof as shall not be directed to be set out for public purposes, among the persons interested therein, and to set out, divide, and improve, in such manner as herein-after mentioned, so much thereof as shall be directed to be set out for public purposes; and the commissioners, if they shall so think fit, may appoint an assistant commissioner to be present and to preside at such meeting, and to take the votes of the persons present thereat; and the persons, or their agents, present at the meeting, or the majority in number, and the majority in respect of interest, may appoint a valuer; and in case the majority in number and the majority in respect of interest shall not agree upon the ap-

the subsequent assents to the provisional order — it puts the parties in the same position as they would have been under the old system, had they obtained a private enclosure act.

pointment, then the commissioners shall appoint a valuer: provided always, that no person shall in anywise act as an assistant commissioner in an enclosure under this Act, or be appointed a valuer in such enclosure, who shall be interested in such enclosure, or shall be the agent ordinarily entrusted with the care, superintendence, or management of the estate of any person so interested.

Instructions to Valuer.

XXXIV. And be it enacted, that at the meeting for appointing a valuer, or at some other meeting called by the commissioners for the purpose, the persons present, by themselves or their agents, at such meeting, or the majority in number and in respect of interest of such persons, may resolve upon instructions to the valuer not inconsistent with the terms and conditions of the provisional order of the commissioners, and of any act hereafter to be passed by which the enclosure may have been authorized, for the appropriation of parts of the land proposed to be enclosed for such public purposes as herein-after mentioned, or any of them; that is to say, for the formation of public roads and ways; for widening or improving existing public roads and ways; for a supply of stone, gravel, or other materials for the repairs of the roads and ways within the parish in which such land shall be situate; for the formation of

Instructions
to valuer.

such public drains, watercourses, or embankments as may appear conducive to the health and advantage of such parish or the neighbourhood; for the formation or improvement of public ponds, wells, and watering-places; for a place of exercise and recreation for the inhabitants of the neighbourhood; for allotments or field gardens for the labouring poor; for a supply of fuel for the poor or other inhabitants of such parish; for land for any burying-ground, or enlarging any burying-ground; for the site of any church or chapel, parsonage-house, school, workhouse, or garden to be attached thereto respectively; or for any other purpose of public utility or convenience, or for the general convenience or accommodation of the persons interested in the land to be enclosed; and also, upon instructions to such valuer, for the formation, alteration, or improvement on the land to be enclosed of private or occupation roads and ways, common ponds, ditches, watercourses, embankments, tunnels, bridges, and fences, or any of them, or any other works for the improvement of such land, or for the convenience of the occupiers of the respective allotments thereof; and also for the adoption and use, for the purposes of the enclosure, of a copy of any map or plan which shall have been confirmed under the hands and seal of the tithe commissioners of the land in question, or of any other map or plan of the accuracy of which the en-

closure commissioners shall be satisfied, or for making any new survey, map, or plan; and as to all other matters and things which may be proper to be done in the matter of the enclosure; and also for the raising and payment of all expenses incident to such enclosure, either by sale of part of the land proposed to be enclosed, or by such rate as herein-after provided, as to the persons present at such meeting, or such majority as aforesaid, shall seem fit; and the majority in number and value as aforesaid may make any agreement with the valuer for the payment of such valuer for the duties to be performed by him under this Act; and all such instructions, and such agreement (if any), shall be reduced into writing, and shall be sent by the assistant commissioner (if any) present at the meeting, or otherwise by the chairman of the meeting, to the office of the commissioners; and it shall be lawful for the commissioners, having regard to the protection of the rights of all persons interested in the enclosure, to allow or disallow such instructions in whole or in part, or to make such alterations therein or additions thereto, not inconsistent with the terms and conditions of such provisional order and act as aforesaid, and to allow or disallow such agreement, as they shall think proper; and in case no instructions shall have been so resolved upon, and sent to the commissioners, or in case they shall disallow the instructions so resolved upon

and sent, it shall be lawful for the commissioners to frame such instructions as they shall think proper, not inconsistent with the terms and conditions of such provisional order and act as aforesaid; and in case no such agreement shall have been sent, or the agreement sent shall have been disallowed, it shall be lawful for the commissioners to make such order for the payment of the valuer as they shall think proper; and a copy, under the seal of the commissioners, of all such instructions, as the same shall have been allowed, altered, or framed as aforesaid, shall be delivered to the valuer, with a copy of such provisional order and act of parliament (if any) as aforesaid; and the valuer shall in his proceedings in such enclosure observe and obey the directions and declarations of such provisional order, act, and instructions respectively.

Contested Claims may be decided by Assistant Commissioner specially appointed as Assessor.

Valuer may be assisted by an assistant commissioner.

XXXV. And be it enacted, that the said valuer, upon the hearing and determining of any contested claim or objection, or upon awarding any costs, as herein-after mentioned, shall, if he think proper, or if the persons interested shall in their instructions to the valuer so direct, be assisted by an assistant commissioner, specially appointed as an assessor, who shall be a

practising barrister-at-law of five years standing at the least; and the determinations of the said valuer as to all such contested claims and objections, and costs, shall be made pursuant to and in conformity with the decisions of such assessor: provided nevertheless, that such assessor shall not interfere further in the execution of this Act than in settling what contested claims shall be allowed or disallowed, and what costs, if any, shall be allowed to or paid by any parties making or objecting to such claims.

Instructions to Valuer.

XXXVI. Provided always, and be it enacted, that if the commissioners shall alter or add to the instructions to the valuer which shall have been resolved upon at a meeting of the persons interested as aforesaid, or shall disallow any such instructions and frame other instructions in lieu thereof, the commissioners shall cause to be deposited for inspection, as hereinbefore directed with respect to the provisional order, a copy of the instructions so altered, or of the instructions so added to with the additions, or of the instructions so framed by the commissioners, as the case may be, and shall call a meeting, with fourteen days' notice, of the persons interested as aforesaid, for the consideration thereof; and if such altered instructions, or such additions to the instructions, or

Alterations in the instructions to valuer by commissioners not to be acted upon unless sanctioned by a majority of the persons interested.

the instructions so framed by the commissioners, as the case may be, shall not be approved by the majority in number and the majority in respect of interests of the persons present at such meeting or at some adjournment thereof, or at some other meeting of the persons interested as aforesaid, called with such notice as aforesaid, such enclosure shall not be proceeded with unless and until some instructions to the valuer, resolved upon or approved by the majority in number and the majority in respect of interests at some meeting of the persons interested as aforesaid, called with such notice as aforesaid, or at some adjournment thereof, shall be finally allowed by the commissioners.

A surveyor
may be ap-
pointed
where the
parties
interested
think fit.

XXXVII. And be it enacted, that at the meeting for appointing a valuer, or at some other meeting called by the commissioners for this purpose, it shall be lawful for the persons, or their agents, present at such meeting, or the majority in number, and the majority in respect of interest (if they shall so think fit), to appoint a surveyor for the purposes of such enclosure, to assist or act under the directions of the valuer in the admeasurement, mapping, and setting out of the lands to be enclosed.

Valuer's Declaration.

Form of de-
claration by
valuer.

XXXVIII. And be it enacted, that no valuer shall be capable of acting until he shall

have made and subscribed, before the said commissioners or some assistant commissioner, justice of the peace, or master extraordinary in Chancery, the following declaration; (that is to say,)

‘I do solemnly declare, that I will
‘faithfully, impartially, and honestly, according
‘to the best of my skill and judgment, perform
‘all the duties of a valuer in the enclosure of
‘ according to the provisions of an act
‘passed in the year of the reign of her
‘Majesty Queen *Victoria*, intituled .’

Which declaration it shall be lawful for the commissioners or any assistant commissioner, justice, or master extraordinary in Chancery, to administer; and every such declaration so made and subscribed shall be countersigned by the person before whom the same shall have been made, and shall be sent by him to the office of the commissioners; and a certificate, under the seal of the commissioners, that the person named in such certificate has been appointed a valuer in the matter of an enclosure, and has made and subscribed the declaration required by this Act, shall be conclusive evidence of such appointment, and of his having made and subscribed such declaration.

Boundaries of Parishes and Manors.

Power to set
out bound-
aries of
parishes.

XXXIX. And be it enacted, that in case it shall be represented to the commissioners by the valuer acting in the matter of any enclosure, that the boundaries of any parish or manor in which the land proposed to be enclosed, or any part thereof, shall be situate, and of any parish or manor adjoining thereto, are not then sufficiently ascertained and distinguished, it shall be lawful for the commissioners, or any assistant commissioner by them appointed for that purpose, after giving such notices as they or he shall think necessary for the protection of the rights of all persons interested in this behalf, to ascertain and set out the same respectively in writing under the hand and seal of such assistant commissioner, or under the seal of such commissioners; and after the said boundaries shall be so ascertained and set out and fixed, the same shall and are hereby declared to be the boundaries of such parishes and manors respectively *; and the commissioners or assistant

* The provisions of the Tithe Commutation Act enable that commission, with certain assents, to settle boundaries for all purposes. The enclosure commission appears, however, only to take power to settle boundaries for the purposes of their own act. The difficulties arising from numerous concurrent jurisdictions for settling boundaries for particular purposes are very great. It is submitted that it would be a great public good if the ordnance surveyors were enabled, after perambulation,

commissioner shall, within one calendar month after ascertaining and setting out the boundaries, publish the same, by causing a description thereof in writing to be delivered to or left at the place of abode of one of the churchwardens or overseers of the poor of each of the parishes of which the boundary shall be so set out, and of the lords of the several manors of which the boundary shall be so set out, or of the stewards of the respective manors, and shall give notice that such boundary has been so set out, and that such description has been so left as aforesaid, by advertisement: provided always, that any person interested in the determination of the commissioners or assistant commissioner respecting the said boundaries, who shall be dissatisfied with such determination, may within one calendar month next after the publication of the said boundaries, by delivering or leaving such description as aforesaid, give notice in writing of his dissatisfaction to the commissioners, specifying the particulars in respect whereof he may be dissatisfied, and request that the matter in dispute may be submitted to the determination of a jury; or any person dissatisfied may, within one calendar month after such publication of the said boundaries, give notice in writing to the commissioners of such dissatis-

Appeal on
questions of
boundary.

deposit of a map, and appeal allowed to the enclosure or tithe commission, to settle boundaries for all purposes and for ever.

faction, and of such particulars thereof, and of his intention to apply to the Queen's Bench to remove the determination of the commissioners or assistant-commissioner, by certiorari, into the said court; and in every case in which any person shall have requested that the matter in dispute may be submitted to the determination of a jury as aforesaid, and no notice shall have been given to the commissioners by any person, within the time herein-before limited, of his intention to apply to the court of Queen's Bench to remove the determination of the commissioners or assistant commissioner, by certiorari, as aforesaid, or such determination shall not have been removed within the time herein-after limited, the commissioners shall and they are hereby required to issue a warrant under their hands and seal to the sheriff of the county in which the parishes and manors in question, or one of them, shall be situate, commanding such sheriff to impanel, summon, and return, and such sheriff is hereby accordingly empowered and required to impanel, summon, and return, a jury of at least eighteen sufficient and indifferent men, qualified according to the laws of the realm to be returned for trial of issues in her Majesty's courts of record at *Westminster*; and the persons so to be impannelled, summoned, and returned are hereby required to appear before any assistant commissioner specially appointed by the commissioners for that

purpose at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons so to be impanelled, summoned, and returned, a jury of twelve men shall be drawn by the said assistant commissioner, or by some person to be by him appointed, in such manner as juries for trials of issues joined in her Majesty's courts of record at *Westminster* are by law directed to be drawn; and in case a sufficient number of jurymen shall not appear at the time and place so to be appointed as aforesaid, such sheriff shall return other honest and indifferent men of the standers-by, or of others that can speedily be procured to attend that service, (being so qualified as aforesaid,) to make up the said jury to the number of twelve; and all parties concerned may have their lawful challenges against any of the said jurymen, but shall not challenge the array; and the said assistant commissioner is hereby empowered and required to summon before him all persons who shall be thought necessary to be examined as witnesses touching the matter in question, and may authorize or order the said jury, or any six or more of them, to view the boundaries, or the part thereof which is in controversy; and such jury shall upon their oaths, or being Quakers upon their affirmations (which oaths and affirmations, as well as the oaths and affirmations of all such persons as

shall be called upon to give evidence, the said assistant commissioner is hereby empowered and required to administer), inquire into and ascertain the said boundaries, or such part thereof as shall have been in controversy, and shall declare whether the said boundaries, as described and set out and published as aforesaid, are or are not the true boundaries of the respective parishes and manors respectively, and in case they shall declare that the same are not the true boundaries, then shall declare in what manner the boundaries so described and set out and published as aforesaid ought to be amended, and shall give verdict accordingly; and the assistant commissioner shall reduce such verdict to writing, and certify the same to the commissioners, under his hand and seal; and in case such jury shall have declared that the boundaries so described and set out and published as aforesaid ought to be amended, the commissioners shall amend the same in accordance with such verdict, and such amended boundaries shall thenceforth be conclusive on all persons whomsoever.

Non-attendance of
jurymen.

XL. And be it enacted, that if any person so summoned and returned upon any such jury as aforesaid shall not appear, or appearing shall refuse to be sworn, or being a Quaker to make affirmation, or shall refuse to give his verdict,

or shall in any other manner wilfully neglect his duty, contrary to the true intent and meaning of this Act, or if any person so summoned to give evidence as aforesaid shall not appear, on being paid or tendered a reasonable sum for his costs and expenses, or appearing shall refuse to be sworn, or being a Quaker affirmed, or to give evidence, every person so offending, having no reasonable excuse, to be judged of and determined by the said assistant commissioner, shall forfeit and pay for every such offence any sum not exceeding ten pounds; all which said penalties and forfeitures shall and may be recovered as penalties and forfeitures are recoverable under this act.

XLI. And be it enacted, that every such jury and jurymen as aforesaid shall also be subject to the same regulations, pains, and penalties as if such jury and jurymen had been returned for the trial of any issue joined in any of her Majesty's courts of record at Westminster.

 Juries subject to same regulations as if returned for any court at Westminster.

XLII. And be it enacted, that in every case in which the verdict of a jury shall be given in favour of the person who shall have requested that such jury be summoned, all the costs of summoning such jury and the expenses of witnesses shall be defrayed by the commissioners, and shall be expenses in the enclosure in the matter of which the question shall have arisen, and such costs and expenses shall be

 Costs of appeal.

settled and determined by the said assistant commissioner as aforesaid; but if the verdict of the jury shall be given against such person, the said costs and expenses shall be defrayed by such person; and in case such costs and expenses shall not be paid to the party entitled to receive the same within ten days after the same shall have been demanded, then the same shall and may, by warrant of the commissioners, directed to any person or persons whomsoever, be levied by distress; but in case such person shall have requested such jury to be summoned in pursuance of a resolution of the rate-payers of any parish in vestry assembled, the costs and expenses so paid by him shall be repaid to him by the overseers of the poor of such parish, out of the poor's rate, and shall be allowed in account to such overseers.

Security for costs to be taken by the commissioners.

XLIII. And be it enacted, that every person who shall be dissatisfied, and shall require a jury to be summoned as aforesaid, shall at his own costs, before the commissioners shall be obliged to issue their warrant for the summoning of such jury, enter into a bond, with two sufficient sureties, to the commissioners, in a sufficient penalty, to prosecute the complaint, and to bear and pay their costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses, in case the said costs and expenses shall fall upon them.

XLIV. And be it enacted, that any person interested in the determination of the said commissioners or assistant commissioner respecting the said boundaries, who shall be dissatisfied with such determination, and who shall, within the time herein-before limited, have given to the commissioners notice in writing of his intention to apply to the Court of Queen's Bench, as herein-before mentioned, may, within six calendar months next after publication of the said boundaries, move the Court of Queen's Bench to remove the said determination of the commissioners or assistant commissioner by certiorari into the said court, the party making such application giving (in addition to such notice of his intention as aforesaid) eight days' notice of such application to the said commissioners; and in case of removal as aforesaid, the decision of the said court therein shall be final and conclusive as to the boundaries of such parish or manor; and after the expiration of the said term of six calendar months the determination of the commissioners or assistant commissioner shall not be removed or removeable by certiorari, or any other writ or process whatsoever, into any of her Majesty's courts of record at Westminster or elsewhere; and no certiorari shall be allowed to remove such determination unless the party prosecuting the certiorari shall before allowance thereof enter into a recognizance before one of the

Persons dissatisfied with determination of commissioners may appeal to Court of Queen's Bench.

justices of the said court in the sum of fifty pounds, with condition to prosecute the same without wilful delay, and to pay to the said commissioners their full costs and charges within one calendar month after the determination shall have been confirmed, to be taxed according to the custom of the court; and no determination of a jury under the provision herein-before contained shall be removed or removeable by certiorari; and in every case in which any determination of the commissioners or of any assistant commissioner, respecting the boundary of any parish or manor, shall be removed into the Court of Queen's Bench, it shall be lawful for the court to direct the trial of one or more feigned issues upon such points as the court shall think fit, and also to direct who shall be the plaintiff or plaintiffs, and who shall be the defendant or defendants, on such trial, or to determine the same in a summary manner, or otherwise dispose of the question or questions in dispute, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.

Power to
straighten
boundaries.

XLV. And be it enacted, that for the purpose of shortening or rendering straight any boundary fences between the land to be enclosed and any adjoining lands it shall be lawful for the valuer acting in the matter of any enclosure, with the consent in writing of the person interested in such adjoining lands, to set out and

determine the boundaries between the land to be enclosed and such adjoining land, or to draw and define a new line of boundary, as he shall judge proper, for the purposes aforesaid; and after such boundaries shall have been so set out and determined as aforesaid, or such new line of boundary drawn and defined, the same shall be made, fenced, ditched, or mounded by such person, in such manner, and at such times as the valuer shall direct, and shall for ever thereafter be deemed the boundaries and limits of such respective lands.

Notices of Enclosure Meetings.

XLVI. And be it enacted, that the valuer acting in the matter of any enclosure shall from time to time hold such meetings for the examination of claims, and otherwise in the matter of such enclosure, as occasion shall require, and shall cause notice to be given on the church door, and also like notice to be given by advertisement, of the time and place of the meeting in the matter of such enclosure, and of each subsequent meeting, in the like manner, fourteen days at least before such respective meeting (meetings by adjournment only excepted); and if from any cause the valuer shall think fit to adjourn or postpone any such meeting, it shall be lawful for him to adjourn or postpone such meeting to any future day.

Valuer to hold meetings.

Claims.

Claims to be
delivered in
writing.

XLVII.* And be it enacted, that all persons claiming any common or other right or interest in any land proposed to be enclosed as aforesaid shall deliver such claims† in writing to the valuer acting in the matter of such enclosure,

* This clause is in a great measure adopted from the 6th sect. of the General Enclosure Act.

On that clause Mr. Coventry observes, "A non-compliance with this requisition will exclude the party from all participation in the lands to be divided, if the commissioners either casually or intentionally omit to make him any allotment." Such will be the case also under the act now before us. The commissioners, indeed, have power to receive claims after the meeting for that purpose, but only for some special cause. It is probable that this power will be but sparingly exercised, otherwise the list of deposited claims will become useless for the purpose for which the deposit was directed.

Sir W. D. Evans observes upon the corresponding clause in the act of George the Third, "The drawing a claim conformable to this clause requires a very considerable portion of technical accuracy; and I have in practice known many valuable rights defeated in consequence of the informality of the claim." 1 Evans on stat. 29. n.

In a case where an allotment was made to a person in possession, but whose title was afterwards questioned, the person questioning the possessor's title had put in no written claim. The Court refused to acknowledge his right to the allotment, whether he had title to the old enclosure or not. Cov. on Encl. 141.

† It is essential that these claims be correctly drawn, as in cases of appeal they will become the terms of the feigned issue. Vide *antè*, p. 76. Some forms of claims have been appended, but it is not probable that they will meet all the cases that must arise under the act.

at such meeting as the valuer shall appoint for the purpose, stating the several particulars in respect whereof such claims are made, and distinguishing the claims in respect of freehold, copyhold, customary, and leasehold property from each other, and mentioning therein the places of abode of the respective claimants, or their agents, at which notices in respect of such claims may be delivered; and no such claim shall be received by such valuer after the last meeting to be held for that purpose (of which notice shall be given), except for some special cause, to be allowed by the commissioners.

XLVIII. And be it enacted, that a statement of all claims in the matter of any enclosure which shall have been delivered to the valuer acting in the matter of such enclosure, as herein-before provided, shall be made, and deposited by him at some public place within the parish in which the land to be enclosed, or the greater part thereof, shall be situate; and the valuer shall give notice on the church door of such parish and by advertisement of such statement having been deposited, and shall in such notice limit such time for the delivery of objections to claims as the commissioners under the circumstances of each enclosure shall think reasonable, and by order under their seal direct, or in case no direction shall have been given by the commissioners in this behalf, then such time as the

Statement of
claims to be
deposited for
examination.

valuer shall think reasonable, not being less in any case than twenty-one days after such notice shall have been given; and every person who shall object to a claim shall deliver his objection in writing to the valuer, and also deliver a copy of such objection at the place of abode of the claimant or his agent within the time limited for delivery of objections to claims as aforesaid; and no objection to any such claim shall be received by the valuer after the time so limited for the delivery of objections to claims, unless for some special cause to be allowed by the commissioners; and after the time limited for the delivery of claims shall have expired the valuer shall cause fourteen days' notice to be given of the time and place of the meeting for the examination of such claims, and for the attendance of all parties concerned therein; and at such meeting the valuer shall proceed to examine into and determine such claims, and shall and may allow or disallow the same, in whole or in part, and make such order therein, as to him shall appear just; and in case any doubts or difficulties shall arise respecting such claims, or any differences shall happen between any of the claimants touching their respective claims, or the relative proportions of their rights and interests, the valuer shall determine the same, and shall make such order therein as to him shall appear just, which order shall be final, unless any party shall be dissatisfied with

Claims to be heard and determined by valuer, subject to appeal to commissioners.

the determination of the valuer, and shall give notice, as herein-after provided, of his desire to have the claim or matter heard and determined by the commissioners or an assistant commissioner; or in case the commissioners shall think fit to revise such determination, under the power herein-after contained; and in case the valuer, on the determination of any claim which shall have been objected to as aforesaid, or if any objection which shall have been made to any claim, shall see cause to award any costs, it shall be lawful for the valuer, upon application, to assess and award such costs as he shall think reasonable to be paid to the person in whose favour any determination shall have been made, and by the person whose claim or objection shall have been disallowed; and in case any person liable to pay such costs shall neglect or refuse to pay the same, upon demand, or within fourteen days thereafter, the valuer shall, by warrant under his hand and seal, directed to any person or persons whomsoever, cause such costs to be levied by distress; and if there shall be no goods or chattels whereon to levy such costs, it shall be lawful for the person in whose favour such costs shall be awarded to recover the same by action of debt or on the case, in which action it shall be sufficient for the plaintiff to declare that the defendant is indebted to him in the sum specified in the order of adjudication made by the valuer, and in con-

sequence of such order, without setting forth any other proceedings under this Act: provided always, that the valuer may pay the expenses of any witnesses, or of the production of any writings, maps, plans, and surveys, or copies thereof, where such witnesses shall attend, or such maps, plans, surveys, or copies thereof shall be produced before such valuer, only on the request and for the information or guidance of the valuer (and not on behalf of any party in difference), such last-mentioned expenses to be considered as part of the expenses of the enclosure.

Titles.

Titles not to be determined by valuer, commissioners, or assistant commissioner.

XLIX. Provided also, and be it enacted, that nothing in this Act contained shall extend to enable the valuer, or the commissioners, or any assistant commissioner, to determine the title of any lands, or to determine any right between any parties contrary to the actual possession of any such party (except in cases of encroachment as herein-after mentioned), but in case the valuer, or the commissioners or assistant commissioner, shall be of opinion against the rights of the party in possession, they or he shall forbear to make any determination thereupon until the possession shall have been given up by such party, or recovered from him in due course of law, or, where the circumstances shall admit, such valuer, or the

commissioners or assistant commissioner, may declare what right is appendant or appurtenant to any land or hereditament, or otherwise declare by any sufficient description the rights of the owner for the time being of any land or hereditament, without declaring by name who may be the actual owner of such land or hereditament.

Encroachments.

L. And be it enacted, that all encroachments and enclosures, other than enclosures duly authorized by the custom of any manor of which such land shall be parcel, or otherwise according to law, which shall have been made by any person, from or upon any part of the land proposed to be enclosed, within twenty years next before the first meeting for the examination of claims in the matter of the enclosure thereof, whether any amerciamment, rent, or money payment or acknowledgment shall or shall not have been paid or made in respect of the same, to or for the use of the lord of the soil or any other person, shall be deemed parcel of the land subject to be enclosed, and shall be divided, allotted, and enclosed accordingly: provided always, that in case, under the circumstances of any such encroachments or enclosures, it shall appear to the commissioners just or reasonable that rights or interests in the lands to

Encroach-
ments within
twenty years.

be enclosed should be allowed to the persons in possession of such encroachments or enclosures, it shall be lawful for the commissioners, either in the instructions to the valuer, or by any subsequent order under their seal, to direct what rights and interests, either absolute or for any limited terms or estates, should be allowed in respect of such encroachments, and the valuer shall allow and declare such rights accordingly: provided also, that it shall be lawful for the several persons who shall be in possession of any such encroachments or enclosures, or in the receipt of the rent thereof, at the time of the determination of claims under this Act, to take down or remove all such buildings, fences, and other erections as shall then be thereon, and to convert the materials thereof to their own use, within two calendar months after notice in writing signed by the valuer given to such respective persons, or posted on the church door; and in case any dispute or difference shall arise touching any such encroachments or enclosures, or as to the extent thereof, such dispute or difference shall be determined by the valuer.

School-
houses, &c.
not to be
deemed en-
croachments.

LI. Provided also, and be it enacted, that in case any such land shall have been taken or used, at any time before such first meeting for the examination of claims, for the erection of a school-house or the appurtenances thereto, or for other such purposes as in the opinion of the

commissioners shall be charitable or parochial purposes, such land so taken or the erections made thereon, shall not be taken or deemed to be of the nature of an encroachment within the meaning of this Act; but where such land shall have been so taken for the purposes aforesaid within twenty years next before such first meeting for the examination of claims, it shall be lawful for the commissioners, where it shall appear just and desirable for the purposes of enclosure, to direct that such land be deemed parcel of the land subject to be enclosed, and be divided, allotted, and enclosed accordingly, and that compensation be made to the persons in possession thereof, or to trustees for the purposes for which such land shall have been so taken or used, by adequate allotments of the land so to be enclosed.

LII. Provided always, and be it enacted, that all lands which shall have been enclosed from any land subject to be enclosed under this Act for more than twenty years next preceding the day of the first meeting for the examination of claims in the matter of such enclosure, shall for the purposes of this Act be deemed and taken to be ancient enclosures, but not so as to carry any right of common, or compensation or allotment for or in respect of right of common, which might be claimed in respect of ancient enclosures.

Encroach-
ments of
twenty years'
standing to
be deemed
ancient
enclosures.

Rights of Toftowners.

Rights in
respect of
tofts to be
allowed.

LIII. And be it enacted, that all tofts, foundations, or sites of ancient commonable messuages or cottages, shall, upon proof being made to the satisfaction of the valuer acting in the matter of any enclosure that commonable messuages or cottages formerly stood thereon, be deemed commonable messuages or cottages, and the respective proprietors thereof shall be entitled to the same compensation for the rights of common originally belonging thereto as if such messuages or cottages were still standing.

Enjoyment for Sixty Years constitutes a Right.

Rights not
sustainable
in law to be
allowed upon
proof of sixty
years' usage.

LIV. And be it enacted, that where any claim shall be made to any right of common, or other right * which in the judgment of the valuer, or of the commissioners or assistant commissioner, could not be sustained in law, but proof shall be made to the satisfaction of the valuer, or of the commissioners or assistant commissioner, that there has been enjoyment

* A difficulty will probably arise upon the construction of this clause. The Courts have inclined to hold, that there is no such thing as a right of common not sustainable in law. See *Ivatt v. Mann*, 3 Scott, N. R. 364. In *Benson v. Chester*, 8 T. R. 396. the language of the conveyance was stronger than the language of this clause. The common was there conveyed to trustees in trust, to allow the commoners such user of the common as they

under the right so claimed for the space of sixty years or upwards next before the first meeting for the examination of claims in the matter of such enclosure, it shall be lawful for the valuer, or the commissioners or assistant commissioner, to allow such claims, in such and the same manner as if the right so claimed might have been legally sustained and established.

*Appeal from Valuer's Decision to
Commissioners.*

LV. And be it enacted, that after the valuer shall have heard and determined all claims and objections which shall have been made in the

Schedule of
claims allow-
ed by valuer
to be made
and deposited
for inspection.

had been accustomed to have ; but the Court held that the word "user" must mean legal user.

If, on the other hand, it should be held that every user of sixty years' duration is legalised by this provision, many cases will doubtless occur in which commoners who have turned a greater number of cattle on the common than their land will winter, will advance claims to allotments in proportion to the quantities of cattle they have actually turned on for sixty years past. This certainly was not the intention of the framers of the statute ; but it is submitted that it will be difficult to draw distinctions between the claimants to the benefit of this provision. A. claims, as an inhabitant, an unlimited right to turn on upon the common. B. claims, as the possessor of an ancient tenement, a right to turn on thrice the number of cattle that his tenement will winter. Both have an user of sixty years. Both claims are bad in law ; but if the claim of the inhabitant is included within the protection of this clause of the act, it seems difficult to understand how the claim of the surcharger can be excluded from it.

Claims may
be reheard
by commis-
sioners or an
assistant com-
missioner.

matter of an enclosure he shall cause a schedule of such claims and objections, and of his determinations thereon, to be deposited, and to remain for thirty days at the least, for the inspection of all persons interested therein, at some public place within the parish in which the land to be enclosed, or the greater part thereof, shall be situate, and shall cause notice to be given on the church door of such parish, and by advertisement, of such deposit, and shall also send a copy of such schedule to the commissioners, and shall furnish any explanations or information in relation thereto to the commissioners, as they shall require; and in case any party dissatisfied with any determination of the valuer as aforesaid shall, within thirty days next after notice by the valuer of such deposit of the said schedule, cause to be delivered to the commissioners notice in writing of such dissatisfaction, and of the desire of such party to have the claim or matter so determined by the valuer heard and determined by the commissioners or by an assistant commissioner, or in case the commissioners shall, on the representation of any persons interested in such enclosure, or on the information given by the valuer in relation to such schedule, be of opinion that all or any of the determinations of such valuer shall have been made without due consideration of the legal rights of the parties interested, or shall be erroneous, then and in

any such case the commissioners shall forthwith give notice, in such manner as they shall think fit, appointing some convenient place and time for holding a meeting to hear and determine the claim or matter which shall be so desired to be reheard, or all or any of the claims or matters which shall be mentioned in the said schedule, as the commissioners shall think fit; and the commissioners, or any assistant commissioner specially empowered for that purpose, shall rehear and determine such claim or matter; and the determination of the commissioners or such assistant commissioner shall be final and conclusive, and shall be binding on the valuer acting in the matter of such enclosure, unless any party dissatisfied therewith shall try his right by an issue at law, as hereinafter provided.

Appeal from Commissioners' Decision to a Court of Law by feigned Issue.

LVI. Provided always, and be it enacted, Appeal against determination of the commissioners. that if any person claiming to be interested in any land proposed to be enclosed under this Act shall be dissatisfied with any determination of the commissioners or assistant commissioner concerning any claim or interest in or to the land proposed to be enclosed under the powers herein-before contained, and shall cause notice in writing of such dissatisfaction to be delivered

to the commissioners within thirty days next after notice of such determination shall have been given to the several parties or persons specially interested, if any such there be, it shall be lawful for such person so dissatisfied, and giving such notice as aforesaid, to bring an action upon a feigned issue against the person in whose favour such determination shall have been made, or against the commissioners, and to proceed to a trial at law at the then next assizes, or at the assizes immediately following such next assizes, to be holden for the county wherein the land relating to which such dispute shall arise shall be situate; and the defendant in such action shall, upon being served with the usual process therein, appear thereto, and accept one or more issue or issues, whereby such claim, and the right and interest thereby insisted upon, may be tried and determined, such issue to be settled by the proper officer of the court in which the said action shall be commenced, in case the parties shall differ about the same; and the verdict given upon the trial of such action shall be binding and conclusive upon all parties thereto, unless the court wherein such action shall be brought shall set aside such verdict, and order a new trial to be had; and after such verdict shall be given, and final judgment obtained thereon, the commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined

according to the event of such trial; and the costs attending any such action shall abide the event of the trial.

LVII. Provided always, and be it enacted, that if no such notice of dissatisfaction shall be given, or if no such action at law shall be commenced as aforesaid, or if any such action shall be commenced, and the plaintiff therein shall not proceed to trial within the time hereinbefore limited for that purpose, unless the court for sufficient cause put off the trial, then the determination of the said commissioners or assistant commissioner shall be final and conclusive.

Determina-
tion of com-
missioners
not appealed
against
conclusive.

LVIII. And be it enacted, that if any person, plaintiff or defendant in any action to be brought as aforesaid, shall die pending the same, such action shall not abate by reason thereof, but may be proceeded in as if no such event had happened, the heir or devisee, or other person entitled to the interest of the deceased party in the matter in question, being served with process in the action; and if any person in whose favour such determination as aforesaid shall have been made, and against whom any such action might have been brought if living, shall die before any action brought, it shall be lawful for the person who might have brought such action to bring the same, within

Actions not
to abate.

the time so limited as aforesaid, against such person as if actually living, and to serve the commissioners with process for commencing such action, in the same manner as the deceased person might have been served therewith if living, and it shall thereupon be incumbent on the commissioners to serve with such process the heir or devisee or personal representative of the deceased person, or other the person who shall claim the benefit of such determination as aforesaid; and on such process being served such heir or devisee or personal representative, or other person, shall appear and defend such action in the name of the person so dead, and proceedings shall be had therein in the same manner as if such person had been living, and the rights, interests, and claims of all parties shall be equally bound by the event of any action so brought or continued as aforesaid as if the death of any of the persons interested therein had not occurred.

Costs.

Commis-
sioners may
award costs.

LIX. And be it enacted, that in case the commissioners, or any assistant commissioner appointed to hear and determine any claim or matter in pursuance of this Act, shall see cause to award any costs, it shall be lawful for the commissioners or assistant commissioner, upon application, to assess and award such costs as

they or he shall think reasonable to be paid to the person in whose favour any determination of the commissioners or assistant commissioner shall have been made, and by the person whose claim or objection shall have been disallowed; and in case any person liable to pay such costs shall neglect or refuse to pay the same upon demand, or within fourteen days thereafter, the commissioners or assistant commissioner shall, by warrant directed to any person or persons whomsoever, cause such costs to be levied by distress; and if there shall be no goods and chattels whereon to levy such costs it shall be lawful for the person in whose favour such costs shall be awarded to recover the same by action of debt or on the case, in which action it shall be sufficient for the plaintiff to declare that the defendant is indebted to him in the sum specified in the order of adjudication made by the commissioners or assistant commissioner, and in consequence of such order, without setting forth any other proceedings under this Act.

Submission to Arbitration.

LX. Provided always, and be it enacted, that in case any person herein-before authorized to bring an action upon a feigned issue, and the person against whom such action might be brought, shall be desirous of submitting the

Differences
may be sub-
mitted to
arbitration.

matter in dispute or difference to the arbitration of any arbitrator, or of any arbitrators and umpire, it shall be lawful for such persons to submit such matter in dispute accordingly, and such submission shall be irrevocable, and the decision thereupon shall be binding on both parties, and be obeyed accordingly, and the costs of such arbitration shall abide the event; and the commissioners may require each of the persons in difference upon any such submission to arbitration to give such security for the payment of the costs of such arbitration as the commissioners shall think fit.

Powers of Valuer.

Power to
valuer to
make water-
courses, &c.

LXI. And be it enacted, that it shall be lawful for the valuer acting in the matter of any enclosure to set out and make such common ponds, ditches, watercourses, embankments, tunnels, and bridges, of such extent and form and in such situations as he shall deem necessary, and as shall not be inconsistent with the terms and conditions and instructions hereinbefore mentioned, in the land to be enclosed, and also to enlarge, cleanse, or alter the course of and improve any of the existing ditches or watercourses, embankments, tunnels, or bridges, as well in and over the same land as also in any ancient enclosures or other lands in the parish or respective parishes in which the land to be

enclosed may be situate, as the valuer shall deem necessary, making such satisfaction to the proprietors of such ancient enclosures or lands, for the damage done thereby, as the valuer shall think just; and the expense of making and enlarging, altering and cleansing such ponds, ditches, watercourses, embankments, tunnels, and bridges, when the same shall be first done in pursuance of this Act, if not otherwise provided for, shall be raised and paid in the same manner as the other expenses of the enclosure; but all such ponds, ditches, watercourses, embankments, tunnels, and bridges shall at all times afterwards be repaired, cleansed, and maintained by such persons and in such manner as the valuer shall direct; provided that no watercourse be diverted or turned without the consent in writing of the person interested in the land from which the same may be diverted, and of the person interested in the lands into which the same may be turned, or to the prejudice of any person interested in such watercourse, except with his consent in writing; and that no ditch or watercourse, embankment, tunnel, or bridge, be enlarged or altered on any land other than the land to be enclosed, without the consent in writing of the person interested in such land.

LXII. And be it enacted, that in the first place the valuer acting in the matter of any Power to alter roads and ways.

enclosure shall and may, before he shall proceed to make any of the divisions and allotments of the land to be enclosed in pursuance of or in any manner not inconsistent with the instructions given to such valuer as aforesaid, set out and make public roads and ways, and widen public roads and ways, in or over the land to be enclosed, and stop up, divert, or alter any of the roads or ways passing through the land to be enclosed, or through any old enclosures in the parish or respective parishes in which the land to be enclosed shall be situate; and the soil of such of the roads and ways so to be discontinued and stopped up as pass through the lands to be enclosed shall be deemed part of the lands to be enclosed: provided always, that nothing herein contained shall authorize the altering or diverting any turnpike road, unless the consent of the majority of the trustees of such turnpike road, assembled at a public meeting called for that purpose, be first obtained: provided also, that before any public road or way shall be discontinued, diverted, stopped up, or altered by the valuer acting in the matter of any enclosure, the valuer shall cause to be affixed at each end of such road or way a notice to the effect that the same is intended to be discontinued, stopped up, diverted, or altered, as the case may be, from and after a day to be mentioned in such notice; and the valuer shall also cause the same notice to be

given by advertisement for four successive weeks, and also on the church door on the four Sundays of the said four successive weeks ; and after the said several notices shall have been so given such road or way shall, from and after the day in such notice mentioned, be deemed to be discontinued, stopped up, diverted, or altered, as the case may be, subject, however, to such appeal as is herein-after mentioned.

Appeal to Quarter Sessions.

LXIII. And be it enacted, that it shall be lawful for any person, within four months after the first Sunday on which such notice shall have been given on the church door of the intention that such road or way should be discontinued, stopped up, diverted, or altered, as the case may be, to make his complaint thereof by appeal to the justices of the peace at the quarter sessions for the county, riding, division, or other jurisdiction in which such road or way, or the greater part thereof, shall be situate, upon giving to the valuer fourteen days' notice in writing of such appeal, together with a statement in writing of the grounds thereof; but it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been given as aforesaid, nor on any hearing of appeal to go into evidence of any other grounds of appeal

Appeal to
quarter
sessions.

than those set forth in such statement as aforesaid.

Trial o
appeal

LXIV. And be it enacted, that in case of such appeal the justices at such quarter sessions shall, for the purpose of determining whether such public road or way shall be discontinued, stopped up, diverted, or altered, or whether the party appealing would be thereby injured or aggrieved, impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions; and if after hearing the evidence produced before them the said jury shall return a verdict that such road or way is unnecessary, or may beneficially to the public be discontinued, stopped up, diverted, or altered, and that the party appealing would not be injured or aggrieved thereby, then the said court shall dismiss such appeal, and shall award the costs of resisting the said appeal to be paid by the appellant to the valuer, and the same shall be recoverable in the same manner as any penalties and forfeitures are recoverable under this Act; but if the said jury shall return a verdict that such road or way is not unnecessary, and that the same could not beneficially to the public be so discontinued, stopped up, diverted, or altered, or that the party appealing would be injured or aggrieved thereby, the said court shall allow such appeal, and such public road or way shall

not be discontinued, stopped up, diverted, or altered; or in case the same shall have been discontinued, stopped up, diverted, or altered, the said court shall make an order restoring the same to its original state, and shall award to the appellant the costs of prosecuting such appeal, and such costs shall be paid by the said valuer out of the monies to be raised for the expenses of the enclosure: provided always, that in every case in which any such appeal as aforesaid shall be made by the surveyor of the highways of any parish or place, under the direction of the inhabitants of such parish in vestry assembled, or, where there shall be no vestry meeting in such place, under the direction of the inhabitants contributing to highway rates assembled at any meeting of which fourteen days' notice shall have been given by advertisement and on the church door, then, although such appeal shall be dismissed, the costs of prosecuting such appeal, and also such costs as shall be awarded to be paid by the appellant to the valuer, shall be paid out of the highway rate of such parish or place.

Public Roads.

LXV. And be it enacted, that such public carriage roads so to be set out as aforesaid shall be well and sufficiently fenced on both sides, by such of the persons interested in the land to be

Roads to be
fenced.

5 & 6 W. 4.
c. 50.

enclosed, and within such time, as the valuer acting in the matter of such enclosure shall direct; and the valuer shall form and complete such parts of the said public roads and ways as shall be newly made; and every such public road and way to be set out and made under this Act, shall be of the width required by the Act of the sixth year of King William the Fourth, intituled "An Act to consolidate and amend the Laws relating to Highways in that part of Great Britain called England," for a road or way of the like description, which may be dedicated to the use of the public.

Expences of
making and
altering
roads.

LXVI. And be it enacted, that the expences attending the purchasing of the soil of all such public roads and ways as aforesaid, and the making, the stopping up, discontinuing, diverting, widening, and altering of such roads and ways, and the money compensation in respect thereof, upon any enclosure, shall be paid in such manner as the expenses of such enclosure shall be directed to be paid.

Roads to be
repaired by
the parish
after certi-
ficate by two
justices of the
peace.

LXVII. And be it enacted, that when and so soon as two or more of her Majesty's justices of the peace for the county, riding, division, or jurisdiction in which the lands to be enclosed shall be situate, shall certify any of the public roads and ways to be set out in pursuance of this Act on any enclosure to be

sufficiently formed and completed, such roads shall thenceforth be kept in repair by such persons and in such manner as the public roads within the said parish are or ought by law to be kept in repair; and every such certificate shall, at the quarter sessions of the peace to be holden for the said county, riding, division, or jurisdiction next after the date thereof, be filed of record by the clerk of the peace.

Private Roads.

LXVIII. And be it enacted, that the valuer acting in the matter of any enclosure shall and may set out such private or occupation roads and ways through the lands to be enclosed as he shall think requisite, for the use of the persons interested in such lands or any of them; and any expences which the valuer may incur relative to the setting out or formation or completion of such private roads and ways, or any of them, shall, unless the valuer shall otherwise direct, be paid in the same manner as the other expences of the enclosure; and such expences of the formation and completion of such private roads and ways as the valuer shall direct shall be borne by, and after the formation and completion of such private roads and ways the same shall be maintained and kept in repair by and at the expence of the owners and proprietors for the time being of the land enclosed, or such

Private
roads.

of them, and in such shares and proportions and in such manner as the valuer shall direct; and after such private roads and ways shall have been set out and made the grass and herbage arising thereon shall for ever belong to and be for the use of such persons interested in the lands to be enclosed as the valuer shall direct, and in the absence of such direction shall belong to the proprietors of the land to be enclosed which shall next adjoin the said roads and ways on either side thereof as far as the crown of the road; and after such setting out as aforesaid all private or occupation roads or ways over, through, and upon the lands to be enclosed which shall not be set out as aforesaid shall be for ever stopped up and extinguished.

Powers of Valuer.

Rights of
common may
be suspended.

LXIX. And be it enacted, that it shall be lawful for the valuer acting in the matter of any enclosure, before the making of the award, when the commissioners shall think necessary for the purpose of the enclosure, and by order under their seal authorize or direct, by notice on the church door to order all or any part of the rights of sheepwalk, common or other rights, in or over the land to be enclosed or any part thereof, to be extinguished from such time or the exercise thereof to be suspended during such time as shall be expressed in such notice, and

from the time mentioned in such notice such rights shall be extinguished or suspended accordingly : and if during the suspension or after the extinguishment of any such rights of sheep-walk, common or other rights as aforesaid, any person shall permit his horses, cattle, sheep, or swine to go or depasture upon any of the lands over which such rights shall be suspended or extinguished, it shall be lawful for the valuer acting in the matter of the enclosure, or any other person by his order (testified in writing under his hand), or any of the persons interested in such lands or in the enclosure thereof, to distrain such horses, cattle, sheep, or swine, being upon such lands contrary to such order, and to impound the same until the person so offending shall pay to the person so distraining such sum of money as the valuer shall by writing under his hand have previously ordered, not exceeding ten shillings for each horse or head of cattle, and five shillings for each sheep or swine so distrained ; and in case the same shall not be paid within seven days after the same shall have been impounded, the valuer is hereby authorised to recover the same by way of penalty, as herein-after mentioned.

LXX. And be it enacted, that it shall be lawful for the valuer acting in the matter of any enclosure, at such time as he shall think fit, by notice on the church door, to direct the

Course of
husbandry
may be
directed.

course of husbandry and the stint or rule of stocking that shall be observed upon the land to be enclosed, until the time when the enclosure thereof shall be completed, as well with respect to the laying down, ploughing, sowing, fallowing, manuring, and tilling thereof, as to the stocking and feeding of the commonable lands and fallows or stubbles upon the same, and to direct such recompence to be made as he shall think right to any person injured by such directions, all which directions shall be binding upon all parties interested, their farmers and tenants; and the valuer shall impose such pecuniary penalties on every person not conforming to such directions as he shall think necessary, not exceeding the sum of five pounds *per* acre in the case of cross-cropping, or withholding from the land its due proportion of manure, or ten pounds in any other case, for any one offence, and shall also determine, in all cases where the tenant is entitled by agreement or custom to the manure arising from the lands in his occupation, by whom and in what sum of money such tenant shall be compensated for any such manure left or given up by him; and such penalties and other sums of money shall be recovered in the same manner as by this Act directed for the recovery of penalties.

Compensation for growing crops.

LXXI. And be it enacted, that the valuer acting in the matter of any enclosure shall by

writing under his hand order what recompence in money shall be made to the owner of any crops growing, according to his agreement or lease, or according to the customary mode of cultivation within the parish in which the land to be inclosed shall be situate, upon such land, at the time of the division, allotment, and enclosure, for the said crops, by the person to whom the land on which such crops are growing shall be allotted, and also what recompence in money shall be paid, and by whom, to any tenant or occupier of land, as well for the ploughing, tilling, cultivating, manuring, or folding any land to be enclosed, for the benefit accruing thereby to the person to whom such land shall be allotted, or for any loss or disadvantage which any tenant or occupier may sustain by the loss of his following or way-going crops upon the land to be enclosed; and if in any of the said cases the money to be paid for such recompence be not paid at the time and in the manner ordered by the valuer, then the same may be recovered by the person entitled thereto, from the person liable to pay the same, in the same manner as penalties and forfeitures are recoverable under this Act.

LXXII. And be it enacted, that the valuer acting in the matter of any enclosure shall allot to the surveyor of the highways for the time being of the parish in which the land proposed

Allotment
for repair of
roads.

to be enclosed, or any part thereof, shall be situate, and to his successors for ever, such part of the land proposed to be enclosed as by the instructions given to such valuer shall have been directed to be appropriated for supplying stone, gravel, or other materials for the repairs of roads and ways, as aforesaid, or in case no such instructions shall have been given in this behalf, and the valuer shall think an allotment necessary for the purposes aforesaid, such part as the valuer shall think fit; and such allotments shall be enclosed and fenced as the valuer shall direct, and shall from the confirmation of the award be vested in the surveyor of the highways within the said parish for the time being, in trust for the purposes aforesaid; and the grass and herbage of such allotments shall belong to such persons as by the valuer shall be directed; and if he shall make no such direction, then such surveyor shall from time to time let any such allotment, reserving the right to get and take away such stone, gravel, and other materials when and as he shall think fit, for the most money that can be obtained for the same, and shall apply the rents and profits towards the repairs of the public roads or highways within the said parish; and the said surveyor shall account for such rents and profits in the same manner as he is by law accountable for other monies that shall come to his hands in the capacity of surveyor of the highways, and

shall be subject to the like penalties for the neglect thereof.

LXXIII. And be it enacted, that the valuer acting in the matter of any enclosure shall and may, in pursuance of the directions of or in any manner not inconsistent with the directions of the provisional order of the commissioners, or any Act hereafter to be passed, or the instructions given to such valuer as aforesaid, set out and allot such part of the lands to be enclosed as by such provisional order or act or instructions respectively shall have been directed to be appropriated as a place of exercise and recreation for the inhabitants of the said parish and neighbourhood; and such allotment shall, unless the same shall be otherwise awarded under the provision herein-after contained, be made and awarded to the churchwardens and overseers for the time being of the parish in which the same shall be situated, and shall be held by the churchwardens and overseers for the time being of the said parish for the purposes aforesaid, and shall be in the first instance fenced, and, where occasion shall require, drained and levelled by the valuer, the expense in such case to be considered part of the expenses of the enclosure, or shall be fenced by any person to whom adjoining land shall be allotted, as the valuer may direct; and the fences of such allotment shall for ever after-

Allotments
for public
purposes.

wards be repaired and maintained, and the surface thereof kept drained and level, by such churchwardens and overseers, or by the churchwardens and overseers of the several parishes interested therein, in such proportions and manner as shall be directed by the valuer, out of the rents to be received for the herbage of the said allotment, or out of the poor rate of the said parish or respective parishes, or otherwise; and the grass and herbage growing upon such allotment may be from time to time let by the churchwardens and overseers in whom the same shall be vested, and the rents which shall be received by them for the same shall be by them from time to time applied, in the first place, in maintaining and repairing the fences of the said allotment, and keeping the surface thereof drained and level, as aforesaid, and, subject thereto, in aid of the rates for the repair of the public highways in the said parish or respective parishes; and the valuer shall in like manner set out and allot such part of the land to be enclosed as by such provisional order or act or instructions as aforesaid shall have been directed to be appropriated as an allotment for the labouring poor unto the churchwardens and overseers of the poor of the parish in which such allotment shall be situate, subject nevertheless to a rent-charge to be payable thereout to any person or persons who may be entitled to allotments under such enclosure, as herein-

after provided ; and the said valuer shall in like manner, in pursuance of the directions of or in any manner not inconsistent with the directions of such provisional order or act or instructions as aforesaid, set out and allot, for the other public purposes mentioned in such provisional order or act or instructions as aforesaid, such parts of the land to be enclosed as shall have been thereby respectively directed to be set apart for such purposes, and such allotments shall be made to such persons respectively, with such regulations and provisions as to the fencing, maintenance, use, and enjoyment thereof respectively, as the valuer, with the approbation of the commissioners, shall direct ; and in every case in which the valuer, with such approbation of the commissioners, shall not think it necessary or proper to direct the same to be otherwise made, such allotments shall be made to the churchwardens and overseers of the poor for the time being of the parish in which such allotments shall be situate ; and all allotments which shall be made to the churchwardens and overseers under this Act shall be held by the churchwardens and overseers of the poor for the time being in the same manner and with the same legal powers and incidents as if the same allotments were lands belonging to the parish, but in trust nevertheless for the purposes for which the same shall be allotted, and subject, as to the said allotment for the labour-

ing poor, to the provisions in relation thereto herein-after contained, and as to all other such allotments, subject to such directions for the maintenance, fencing, management, and use thereof as the valuer, with the approbation of the commissioners, may think fit.

Allotments for Exercise and Recreation.

Provision for
awarding
allotments
for exercise
to individuals,
subject to the
obligation of
permitting it
to be used.

LXXIV. Provided always, and be it enacted, that it shall be lawful for the valuer, with the approbation of the commissioners, to set out and allot such land as shall be appropriated as a place of exercise and recreation as aforesaid to any person entitled to an allotment under the enclosure, and who shall consent to receive the same in full or in part of his allotment; and the person to whom the land so to be appropriated shall be allotted, and all future owners thereof, shall, unless it shall be otherwise directed by the award, be subject to the obligation of maintaining the fences of such land, and of preserving the surface thereof in good condition, and of permitting such land to be at all times used for exercise and recreation by the inhabitants of the parish and neighbourhood, and, subject to such obligations, the herbage of such land shall belong to the person to whom such land shall be so allotted.

Allotments for Labouring Poor.

LXXV. And be it enacted, that every allotment which shall be made and awarded for the labouring poor may be so awarded subject to and chargeable with a clear rent-charge, or clear rent-charges, not exceeding in the whole the net annual value of the allotment in its actual condition at the time of making the same; and every such rent-charge shall be deemed at the time of the confirmation of the award to be of the value of such number of imperial bushels and decimal parts of an imperial bushel of wheat, barley, and oats, as the same would have purchased at the average prices during the seven years ending on the Thursday next before Christmas day one thousand eight hundred and thirty-five, as the same were ascertained by the advertisement inserted in the London Gazette under the provisions of the Act of the seventh year of King William the Fourth, intituled "An Act for the Commutation of Tithes in 6 & 7 W. 4. England and Wales," in case one third part of c. 71. such rent-charge had been invested in the purchase of wheat, one third part thereof in the purchase of barley, and the remaining third part thereof in the purchase of oats, and the respective quantities of wheat, barley, and oats so ascertained shall be stated in the award; and every such rent-charge shall be paid by equal

Allotments for the labouring poor may be made, subject to a corn rent-charge, to vary and be recoverable as a tithe rent-charge.

half-yearly payments on the first day of July and on the first day of January, the first of such half-yearly payments to be made on the first of such half-yearly days after the expiration of three years from the date of the confirmation of such award; and such sum of money shall be payable in respect of such yearly rent-charge as according to the prices ascertained by the then next preceding advertisement for the purposes of the said Act of the seventh year of King William the Fourth would have been payable in respect of a rent-charge of like amount charged on lands under the provisions of such Act; and the sum of money thenceforth payable in respect of such rent-charge charged under the provisions of this Act, shall vary so as always to consist of the price of such number of bushels and decimal parts of a bushel of wheat, barley, and oats, respectively, according to the next preceding advertisement for the time being, in like manner as if the same had been a rent payable under the provisions of the said Act of the seventh year of King William the Fourth; and the persons entitled to any rent-charge charged under the provisions of this Act shall have the same powers and remedies for enforcing payment thereof in all respects as are by the said Act of the seventh year of King William the Fourth, or by any Act for amending the same, given to the persons entitled to rent-charges charged under

the said Act of the seventh year of King William the Fourth for recovering and enforcing payment of such last-mentioned rent-charges; and nothing herein or in such award contained shall render any person personally liable to the payment of any rent-charges to be charged under the provisions of this act: provided always, that when such allotment, or any part thereof, shall be let and occupied as gardens under the provisions herein-after contained, the person for the time being entitled to the rent-charge charged thereon shall not distrain for such rent-charge on the occupiers of such gardens, but the person so entitled may, in case such rent-charge shall be in arrear, give notice to the occupiers of such gardens, and to the allotment wardens, or any of them, and shall thenceforth, until the arrears of such rent-charge, with all expenses occasioned by the non-payment thereof, shall be fully paid, be intitled to receive all the rent which, after such notice shall accrue, in respect of such gardens, and shall have the same remedies for recovering such rent, and the same powers of determining the tenancy of such occupiers, and of letting and dealing with such allotment, as such allotment wardens would have had in case such rent-charge had not been in arrear; and in case the said allotment wardens, or any of them, after such notice shall have been given to them as aforesaid, and before the arrears of such rent-charge,

with all such expenses of aforesaid, shall have been fully paid, shall receive any rent from the occupiers of such gardens, such of the allotment wardens as shall have received such rent shall, on demand, pay to the person then entitled thereto the arrears of the said rent-charge then remaining unpaid, and the expenses occasioned by the non-payment thereof; and in default of such payment, on demand, such arrears of rent-charge and expenses may be recovered from the allotment wardens liable to pay the same as penalties are recoverable under this Act.

*Allotment to Lord.**

Allotment to
the lord of
the manor.

LXXVI. And be it enacted, that after the several allotments herein-before directed shall have been set out and made, and after making provision for the payment of the expenses by sale of land, in case the expenses shall be so directed to be paid, the valuer acting in the matter of any enclosure shall allot and award unto the lord of the manor so much and such part of the land proposed to be enclosed as shall

* It is much to be regretted that the act does not contain a provision authorising the commissioners to give the lord of the manor, instead of an allotment, a rent-charge issuing out of the land to be enclosed. At present the act imposes an outlay of capital upon the lord, often a tenant for life, in bringing his allotment into cultivation — no slight temptation to him to exercise his veto upon the enclosure.

in the judgment of the valuer be equal (quantity and value considered) to such a part of the residue of such land as shall be proportioned to his right or interest therein, according to the directions of the provisional order of the commissioners, in lieu of his right and interest in the soil of the said land, exclusive of any other allotments which may be made to such lord in lieu of or in satisfaction for any other rights or interests in such land to which he may be entitled, and which shall not have been included in the estimate in such provisional order of his right and interest; and in case it shall have been declared by such provisional order that the right or interest of the lord has been estimated exclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under the land to be enclosed, then the valuer shall and may, on the request in writing of the lord, reserve or award to the lord such rights and easements for searching for, working, and carrying away such mines, minerals, stone, or other substrata which shall not have been included in such estimate of his right and interest, subject to such provisions for compensation for damage to be done to the surface in the exercise of such rights and easements, as by the valuer, with the approbation of the commissioners, shall be thought reasonable, and as shall not be inconsistent as to the terms of such provisional order.

Allotments to Commoners.

Allotment of
Residue.

LXXVII. And be it enacted, that after the several allotments herein-before directed shall have been set out and made, and after making provision for all or any part of the expences of the inclosure by sale of lands, in case all or any part of the expences shall be so directed to be paid, the valuer acting in the matter of the enclosure shall divide, allot, and award all the remainder of the land to be enclosed unto and amongst the several persons who shall be interested therein, in such shares and proportions as he shall adjudge and determine to be proportionate to the value of their respective rights and interests which shall have been claimed and allowed under the provisions herein-before contained.

The rent-
charges pay-
able out of
allotments
for the labour-
ing poor to be
allotted to
persons en-
titled under
the enclosure.

LXXVIII. And be it enacted, that where any allotments shall be made for the labouring poor, under the provisions herein-before contained, subject to any rent-charge or rent-charges, such rent-charge or rent-charges may be allotted to any person or persons who may elect to receive the same in full or in part of his or their allotment or allotments; and in case no person shall so elect to receive the same,

then to such persons and in such shares as the valuer may think convenient, for the purpose of equalizing allotments or otherwise; and it shall be lawful for the valuer, for the purposes of allotment under this clause, to estimate the value in fee simple of every such rent-charge to be four-fifths only of the value of an allotment of land equal in net annual value to such rent-charge.

LXXIX. And be it enacted, that when any person to whom any allotment shall be made or land assigned in exchange by virtue of this Act shall hold such land, or the land in respect of which such allotment or exchange is made, under different titles or for different estates, and as to copyhold or customary land, by separate quit-rents, the valuer in the matter of the enclosure shall ascertain and distinguish the land held for each of such estates and under each of such titles respectively, and shall accordingly set out distinct and several allotments for such respective lands, and distinguish the several estates holden by several and distinct quit-rents.

Separate allotment to be made in respect of separate titles.

LXXX. And be it enacted, that in case any number of the persons interested in the land to be enclosed shall desire to have their allotments thrown together, and distinguished by metes and bounds, but not fenced from each

Several allotments may by consent be laid together.

other, and of such their desire shall give notice in writing to the valuer acting in the enclosure, such valuer shall set out the several allotments of such persons so giving notice as aforesaid by metes and bounds, but in one parcel of land, and without requiring them to make any subdivision fences or other fences, save such ring or outer fences as may be necessary, or as the valuer may direct to be made, for dividing the said parcel of land from the residue of the land so to be enclosed.

Cultivated
land and
buildings to
be allotted to
the propri-
etor.

LXXXI. Provided always, and be it enacted, that it shall not be lawful for the said valuer to allot to any other person than the proprietor thereof any land (other than encroachments and enclosures not authorised by law, made within twenty years next before the first meeting for the examination of claims, as aforesaid,) which may be cultivated as orchard or garden, or on which any building may have been erected, or which may have been enclosed by virtue of any agreement between the proprietor thereof and the persons having right of common over the same, without the consent in writing of such proprietor.

Regard to be
had to the
situation of
homesteads.

LXXXII. And be it enacted, that the valuer, in making the several allotments hereby directed, shall have due regard as well to the situation of the respective houses or homesteads

of the persons interested in the land to be enclosed, as to the quantity and quality of the land to be allotted to them respectively, so far as may be consistent with the general convenience of such persons, and that such valuer, in making the said allotments, shall have particular regard to the convenience of the persons interested in respect of the smallest estates in the land subject to be enclosed under this Act.

LXXXIII. And be it enacted, that the several allotments to be made, except the allotments to the surveyor, and churchwardens, and overseers respectively, and the other allotments for public purposes, shall be enclosed, ditched, and fenced at the expence of the respective persons to whom the same shall be allotted, in such manner and within such times as the valuer shall direct; and the fences so to be made shall for ever afterwards be repaired and maintained by such persons as the valuer shall direct; and if from the situation or from any other circumstance it shall happen that any person to whom any allotment shall be made shall not have a fair proportion of the boundary ditches or fences assigned to him to make, it shall be lawful for the valuer acting in the matter of any enclosure to ascertain and appoint what sum of money shall be contributed by such person towards making the boundary ditches and fences of the allotments of such other persons

Allotments
to be fenced.

as shall have assigned to them to make too great a proportion thereof; and such money shall be paid to such persons and in such manner as by the valuer shall be directed, and the same may be recovered in the same manner as penalties or forfeitures are recoverable under this Act.

If interest in land is sold before allotment is made, the valuer to make the allotment to the purchaser.

LXXXIV. And be it enacted, that if at any time before an allotment shall have been made by the valuer, any person shall sell his right or interest in the land to be enclosed, or any part thereof, to any person, the valuer shall, upon such sale being certified to him in writing by the vendor, make an allotment of land to the purchaser, or to his heirs or assigns, in respect of the right or interest so sold; and every such purchaser, or his heirs or assigns, shall from the confirmation of the award hold and enjoy the land so to be allotted to him in such manner as the vendor might or ought to have done in case such sale had not been made; and it shall be lawful for any person who shall be entitled to any allotment under this Act to devise, convey, surrender, or otherwise assure the same allotment, or all or any part of his interest therein, at any time before the confirmation of the award; and every such devise, conveyance, surrender, and assurance shall be of the same validity as if the same had been made after the confirmation of the said award; and it shall be

lawful for any person entitled to any allotment to sell, dispose of, or convey the estate in right of which he may be entitled to such allotment, separate from and retaining to himself such allotment, or the right thereto; and the valuer is hereby required to award such allotment accordingly.

LXXXV. And be it enacted, that if any person interested in any enclosure under this Act shall die before the same shall have been completed, the powers and authorities hereby vested in the commissioners, assistant commissioner, and valuer shall not be thereby determined or suspended, but they shall proceed in the execution of such powers and authorities in such manner as they might have done in case such person had not died; and the allotment which might have been made to the person so dying shall be made to such person as by the law shall become entitled to the same, and shall be accepted and fenced by such party according to the directions contained in the award, and he shall be liable to the charges and expenses and other conditions of the enclosure.

Allotments to be made to representatives of parties dying.

Old Enclosures.

LXXXVI. And be it enacted, that it shall be lawful for the valuer acting in the matter of any enclosure, with the consent in writing of the per-

Old enclosures may be allotted, with consent.

son interested in any old enclosed lands, or lands holden in severalty, or otherwise not subject to be enclosed under the general provisions hereinbefore contained, but within the parish in which the land to be enclosed, or some part thereof, shall be situate, or within some parish adjoining thereto, to order and direct such old enclosed lands or other lands as last aforesaid to be considered as allottable, and parcel of the land to be enclosed; and such allowance shall be made to the person interested in such lands, on account of the situation or other beneficial circumstances thereof, as the valuer shall adjudge to be just and reasonable: and he shall allot and award unto the person so interested in such old enclosed lands or other lands as aforesaid so much and such part of the land to be enclosed as he shall think reasonable and just.

Allotments to Classes of Persons.

Allotments to freemen and other classes of persons entitled to common rights to be made to trustees.

LXXXVII. And be it enacted, that where the freemen or burgesses of any city or borough, or the householders or inhabitant householders of any town or place, or any class or description of such freemen, burgesses, householders or inhabitant householders, or any other persons as a class, shall be entitled to rights of common or other rights over the lands to be enclosed, it shall be lawful for the valuer to award in respect of such rights one or more allotment or

allotments, for the benefit of the class so entitled, to any two or more trustees, who shall be nominated by the majority at such meeting as herein-after mentioned, or in case two or more trustees shall not be nominated at such meeting, then to such trustees as the commissioners shall approve, with provisions for the appointment of new trustees from time to time, or to the churchwardens and overseers of the poor of the parish in which each allotment shall be situate, in trust for the parties entitled to the right in respect of which the allotment shall be made; and it shall be also lawful for the valuer, having regard to such instructions, if any, as may have been resolved on at such meeting as hereafter mentioned, or to such instructions as shall be given by the commissioners in this behalf, to direct in what manner and under what regulations such allotment shall be occupied or enjoyed by the persons from time to time entitled to the benefit thereof, and (in case the valuer, having regard to such instructions, shall think fit), to give directions and powers for the letting of such allotment from year to year, or for any term of years, subject to such provisions and restrictions as the said valuer, with the approbation of the commissioners, shall think fit, and for the receipt of the money to arise from such letting, and for the application of such money for the benefit of the persons entitled to the benefit of the allotment, and to give all such

directions and provisions for the fencing, draining, and management of such allotment, as the valuer may think expedient.

Power to
sell such
allotments.

Application
of purchase
money.

LXXXVIII. Provided also, and be it enacted, that it shall be lawful for the valuer, with the approbation of the commissioners and of such meeting as herein-after mentioned, to sell and dispose of the whole or any part of any allotment to which any such class of persons as aforesaid shall be entitled under this Act; and the allotment or any part thereof so sold shall be conveyed by the commissioners as the purchaser shall direct, and the commissioners shall sign a receipt for the purchase money, which shall be a sufficient discharge for the same; and the purchase money arising from the sale, or the surplus thereof after payment thereof of any expences to which the same shall be liable, shall, with the approbation of the commissioners, be paid to any trustee or trustees, upon trust for the investment thereof, with provisions for the appointment of new trustees from time to time, and for the application of the interest and annual produce of such investment to such purposes, for the benefit of the persons who would have been entitled to such allotment, or the part thereof so sold, in case the same had not been sold, as the commissioners shall approve, and by the final award in the matter of such enclosure direct.

a

LXXXIX. Provided also, and be it enacted, that when the claim of any class of persons entitled as aforesaid shall be allowed the valuer shall certify such allowance to the commissioners, and the commissioners shall call a meeting of such persons by advertisement, for the purpose of appointing trustees of the allotment to be made for their benefit, and for giving instructions to the valuer concerning the enjoyment, occupation, and management of such allotment, or for letting the same, and for the application of the money to arise from such letting, or in case such meeting shall think fit that such allotment or any part thereof shall be sold, for directing the sale thereof, and the investment of the money arising from such sale, and the application of the income thereof; and the commissioners, having reference to the total number of such class (so far as the valuer or the commissioners may have ascertained the same), shall by such notice declare the number of persons who should be present at such meeting to give validity to the proceedings; and the decision of the majority of such meeting shall bind the minority and all absent parties: provided always, that no meeting shall be effectual for the purpose aforesaid unless such a number of the said persons shall attend the same as shall be mentioned in that behalf in the advertisement calling such meeting; and if no effectual meeting shall be held for the purpose aforesaid, or

Meeting of persons so entitled for giving instructions to valuer.

being held, no instructions shall be resolved on by the majority present at such meeting, or in case the commissioners shall deem such instructions unjust or unreasonable, the commissioners may give such instructions to the valuer in respect of the matters aforesaid as they shall think fit; provided that no sale of any such allotment or any part thereof shall be made except in pursuance of a resolution of a meeting called as aforesaid; but a recital in the conveyance by the commissioners upon any sale that such sale was duly authorised shall for all purposes of title be evidence that such sale was made in pursuance of the resolution of a meeting duly called as aforesaid.

Partitions
may be made.

XC. And be it enacted, that where any persons interested in land to be enclosed under this Act shall be so interested in undivided shares, or as joint tenants, coparceners, or tenants in common, it shall be lawful for the valuer, upon the request in writing of any of the persons so interested in undivided shares, or as joint tenants, coparceners, or tenants in common, to make partition of the lands or allotments coming to such persons so interested, and to allot the same to such persons in severalty; and immediately after the said allotments shall be so made and declared the same shall be holden and enjoyed by the persons to whom the same shall be allotted in severalty, subject

to the same uses as such undivided share would have been subject to in case such partition had not been made; and every such partition shall be specified in the award, and shall be valid and effectual to all purposes.

XCI. And be it enacted, that all costs and expenses attending any partition to be made by virtue of this Act shall be borne and defrayed by the several proprietors of or persons interested in the estates which shall be so parted in such manner and proportions as the valuer shall order, and in case of nonpayment thereof shall be recovered in the manner directed with respect to the recovery of penalties and forfeitures.

Costs of partition.

Exchanges.

XCII. And be it enacted, that it shall be lawful for the valuer to allot and award any land to be enclosed in exchange for any other land within the parish in which the land to be enclosed shall be situate, or any adjoining parish; and it shall be lawful for the valuer, in exercise of this present power, to allot all or any part of the land which would have been subject to be allotted under this Act for the purposes of exercise and recreation, or for the labouring poor, or for any other public purposes, to any person, in exchange for other land in the parish or in any adjoining parish which shall ap-

Exchanges.

pear to the valuer more suitable or convenient for the purposes of exercise and recreation, or for the labouring poor, or for such other public purposes as aforesaid, and to allot such other land for such purposes accordingly; and all lands taken and allotted as aforesaid under this provision, although not situate in the parish in which the land given in exchange for the same shall be situate, shall for the purposes of the provisions herein contained be deemed to be within such parish, and be managed and dealt with accordingly; provided that all exchanges under which land shall be taken and allotted for public purposes as aforesaid shall be made with the consent of the person interested in the lands so taken, and that all other exchanges be made with the consent in writing of the persons interested in the lands so exchanged; and every such exchange so to be made shall be valid and effectual to all purposes, and shall be specified and declared in the award: provided also, that no exchange shall be made of any land held in right of any church or chapel or other ecclesiastical benefice, without the consent, testified in writing, of the Bishop of the Diocese and the patron of such benefice: provided also, that all costs and expenses attending the making and completing of any such exchanges, except exchanges of land taken for public purposes, shall be borne by the several parties making such exchanges in such manner and in such proportions as the valuer shall direct, and in

case of nonpayment thereof shall be recovered in the manner directed with respect to the recovery of penalties and forfeitures; and the expenses of the exchanges of land taken for public purposes shall be considered part of the expenses of the enclosure.

XCIIL. And be it enacted, that nothing in this Act contained shall extend to revoke, make void, or alter any will, settlement, uses, or trusts, or to prejudice any person having any right or claim of dower, jointure, annuity, portion, debt, charge, rent, or incumbrance upon or affecting any of the land to be inclosed, or which shall be exchanged or given in partition, in pursuance of this Act, but the land allotted, and the land given in exchange or partition, shall immediately after such allotment, exchange, or partition be and enure, and the several persons to whom the same shall be allotted or given in exchange or partition as aforesaid shall thenceforth stand and be seised and possessed thereof respectively to and for such and the same estates, uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the several lands, rights, or undivided shares thereof, in respect whereof such allotments, exchanges, and partitions shall have been made would have stood limited to and for or been subject to in case the same had not been allotted, exchanged,

Wills and settlements not to be affected.

or given in partition as aforesaid, and as if this Act had not been made, save and except such leases and tenancies at rack rents as shall become void by virtue of this Act, and any joint tenancy which may have been severed by partition as aforesaid, and such rights of common and other rights as are intended to be extinguished by the enclosure, and subject nevertheless to all such mortgages and sales, as shall be made by authority of this Act.

Tenure of the
allotments.

XCIV. * And be it enacted, that all such lands as shall be taken in exchange or on partition or be allotted by virtue of this Act shall be held by the person to whom it shall be given in exchange or on partition, or allotted under the same tenures, rents, customs, and services as the land in respect of which such land shall have been given in exchange or on partition or allotted would have been held in case no such exchange, partition, or inclosure had been made; and the land taken in exchange or on partition or allotted in respect of freehold shall be deemed freehold; and the land taken in exchange or on partition or allotted in respect of copyhold or customary land shall be deemed copyhold or

* It may be remarked that the exchange clauses which are applicable to lands subject to enclosure, apply to all lands without distinction of tenure, whereas the subsequent exchange clauses, giving the commission general powers to authorise exchanges, do not extend to lands of copyhold or customary tenure.

customary land, and shall be held of the lord of the same manor under the same rent and by the same customs and services as the copyhold or customary land in respect of which it may have been taken in exchange or on partition or allotted was or ought to have been held, and shall pass in like manner as the copyhold or customary land in respect whereof such exchanges, partitions, or allotments shall be made, and as to copyhold or customary allotments without any new admittance in respect of the lands taken or allotted respectively; and the land given in exchange or on partition or allotted in respect of leasehold land shall in like manner be deemed leasehold, and shall be held under the same rents and covenants as the land in respect of which it may have been allotted was held, and the remainder or reversion thereof shall be vested in the same lessor respectively as the remainder or reversion of such other land was vested before the exchange, partition, or allotment, except where otherwise particularly directed by this Act.

Leases.

XCV. And be it enacted, that immediately after the allotments herein directed to be made on any enclosure shall have been marked and staked out the valuer acting in the matter of such enclosure may direct the same to be entered

Leases at rack rent, may be voided.

upon by the persons respectively for whom the same shall be intended; and immediately after the valuer shall so direct them to be entered upon, all leases, agreements, and tenancies at rack rent subsisting of any part of the land to be enclosed, or which shall be exchanged in pursuance of this Act, or any common right thereon, shall, so far only as respects the land to be divided and allotted or exchanged, or common right, cease and be void at such time or times as the valuer shall by writing under his hand direct or appoint, so as the respective lessors or landlords of such land do, before or at the respective times at which such leases, agreements, or tenancies shall be directed to cease, make and pay such satisfaction to the respective lessees or tenants, for the loss which shall be sustained by the determination of such leases, agreements, and tenancies respectively, so far as regards the land or common right the leases, agreements, and tenancies whereof are hereby authorised to be determined, as shall be mutually settled and agreed between them, or as the valuer, being required by either of the parties, shall ascertain and direct; and the valuer, being so required, is hereby empowered and directed, by writing under his hand, to apportion a reasonable and proportionable part, having regard to the season of the year, of the rent reserved on any such lease, agreement, or tenancy, for or in respect of the time which shall have

elapsed between the last day on which any payment of the rent shall have become due, and the determination of any such lease, agreement, or tenancy, and such part of the rent shall be recoverable by such ways and means as may by law be used for the recovery of rent in arrear; and the valuer is hereby empowered and directed, in every case where such land or common right shall be held by virtue of any such lease, agreement, or tenancy, together with other lands or hereditaments, by one entire rent, by writing under his hand to apportion and determine what part of such rent shall be deducted in respect of the land or common right in such lease, agreement, or tenancy comprised as to which the same shall be determined as aforesaid, and from what time such deduction shall take place, and the rest of the rent reserved on any such lease, agreement, or tenancy shall during the remainder of the term thereof be the rent of and for the residue of such lands and hereditaments, and shall be payable and recoverable in like manner as the entire rent reserved by such lease, agreement, or tenancy shall immediately before such apportionment be payable and recoverable; and the lessor or reversioner shall in respect of such apportioned rent, and in respect of the residue of such lands and hereditaments, have the benefit and advantage of the provisos and conditions which would have been applicable to the entire rent, and to

all the lands and hereditaments comprised in such lease, agreement, or tenancy, in case such lease, agreement, or tenancy had not been determined as to any part of such land: provided always, that no lease, agreement, or tenancy shall be determined as aforesaid as to any house, cottage, or other building without three calendar months previous notice in writing of such determination, under the hand of the valuer, shall have been given to the lessee or tenant, or left at such house, cottage, or building.

Seigniories.

Seigniories
not affected,
except with
consent.

XCVI. Provided always, and be it enacted, that in every case all seigniories, royalties, franchises, and manorial jurisdictions whatsoever in or upon the land to be enclosed under this Act shall not be deemed to be compensated or extinguished, but shall be saved and excepted out of the operation of this Act, unless in and by the award it shall be declared, with the consent of the lord or respective lords interested therein, that such seigniories, franchises, royalties, and jurisdictions shall be extinguished upon the proposed enclosure.

Minerals.

Minerals
under regu-
lated pastures
may be re-

XCVII. Provided always, and be it enacted, that in every case in which, under the pro-

visions herein-after contained, part of the land subject to be enclosed under this Act shall be converted into and used as a regulated pasture, and the residue thereof shall be divided and allotted in severalty, it shall be lawful for the valuer, having regard to the right of the lord of the manor, as the same shall have been ascertained and declared by the provisional order of the commissioners, and with the consent of the lord of the manor and a majority in value of the other persons interested in the lands proposed to be enclosed, to direct that the rights of the lord of the manor in and to all or any of the mines, minerals, stone, and other substrata under such part of the land as shall be converted into and used as a regulated pasture shall be reserved to the lord, and that all or any of the mines, minerals, stone, and other substrata under the residue to be divided and allotted in severalty shall become the property of the owners of the respective allotments, and that the allotments be adjusted accordingly.

served, while Minerals under lands to be held in severalty are relinquished.

XCVIII. Provided also, and be it enacted, that in every case in which the right to all or any of the mines, minerals, stone, and other substrata under any land enclosed under this Act shall exist as property distinct and separate from the property in the surface, and shall not be compensated upon the enclosure, the right

Right to minerals under land enclosed existing distinct from the property in the surface, and not compensated upon enclosure, not to be affected.

and property in such mines, minerals, stone, or other substrata, and all rights and easements auxiliary to or connected with the exercise or enjoyment of the right and property in such mines, minerals, stone, or other substrata, shall be in nowise affected by the enclosure; and in case any mines, minerals, stone, or other substrata under any land enclosed under this act, or the right of searching for or getting the same, shall have been leased or agreed to be leased to any person as property distinct and separate from the property in the surface, with or without powers over the surface of the land auxiliary to the purposes of such lease, the rights of the lessee or tenant under such lease or agreement shall be in nowise affected by the enclosure.

Wood.

Trees to be
allotted with
the land.

XCIX. And be it enacted, that the timber trees and other trees and underwood standing and growing upon any land to be enclosed shall be allotted and go along with the land whereon they respectively stand, and shall be deemed the property of the several persons to whom the same land shall be respectively allotted, such person paying to the owner of such trees and underwood such sums of money for the same, and at such time or times and place or places, as the valuer shall by writing under his hand

direct ; but if the parties who are to make such respective payments shall neglect or refuse to make the same accordingly, then it shall be lawful to and for the respective parties who shall be entitled to have and receive such payments to enter on the said lands, and cut down, take, and carry away to their own use the said trees and underwood in respect of which the said payments were respectively to be made to them, at any seasonable time or times within one year next after such neglect or default, doing as little damage on the land as may be.

Cattle not to be depastured on Roads.

C. And be it enacted, that no person shall graze or keep any horse, beast, cattle, sheep, or swine upon any of the roads or ways which the valuer shall order to be set out, and which shall be fenced on both sides, for the space of seven years next after the execution of the award; and every owner of land to be enclosed, his servants and labourers, and also every peace officer and parish officer of the parish in which the land shall be situate, for the time being, is hereby empowered to take and empound any such horse, beast, cattle, sheep, or swine which shall be found so grazing as aforesaid, as cattle damage feasant: provided always, that nothing herein contained shall prevent the proprietors of the land which shall next adjoin the private

Cattle not to
be depastured
on roads.

roads and ways from depasturing their cattle thereon so far as the frontage of their respective land extends.

Alteration of Allotments.

Alteration
may be made
in allot-
ments.

CI. And be it enacted, that it shall be lawful for the valuer acting in any enclosure, at any time before the confirmation of the award, with the approbation or by the direction of the commissioners, to make any alterations which he may think right and expedient in the allotments or in the fences which he may have set out and ordered, or in the private roads he may have set out, or in any of the orders or directions relating thereto which he may have made in the matter of such enclosure; and in case any person shall be injured by any such alteration, on account of any expenses he may have incurred, or otherwise, the valuer shall ascertain and determine what recompence shall be made to him for such injury, and shall either pay the amount thereof out of the monies raised for the expense of the enclosure, or shall direct by whom and in what manner such recompence shall be made; and in case of nonpayment thereof the same shall be recovered in the same manner as penalties and forfeitures are recoverable under this act.

Valuer's Report.

CII. And be it enacted, that the valuer acting in the matter of any enclosure shall, as soon as conveniently may be after the division and allotment of the land to be enclosed shall be completed, draw up a report in writing, with a map thereunto annexed, which shall specify all the claims allowed, and all the allotments, exchanges, and partitions made in the matter of such enclosure, and all roads, ways, and works set out or directed to be made by the said valuer; and such report shall contain all such particulars in relation to such allotments, roads, ways, and works as are by this Act directed, and all such other directions and determinations authorised by this Act as the said valuer shall think proper for the purposes of the enclosure; and the map to be annexed to such report shall comprise and show the land to be enclosed and the lands exchanged, and also the lands in respect of which any allotments of the land enclosed shall have been made, and shall distinguish by proper references the allotments made in respect of the several lands respectively, and such other particulars as the commissioners shall by any general or special instructions in relation to such report direct the valuer to set forth therein; and such report shall be signed by the valuer, and shall, toge-

Valuer to draw up a report and annex thereto a map of the claims.

ther with the map thereunto annexed, be sent to the office of the commissioners.

Report to be deposited for inspection.

CIII. And be it enacted, that as soon as the report of the valuer shall have been sent to the commissioners they shall cause a copy of the same to be deposited at some convenient place within the parish in which the land to be enclosed, or some part thereof, shall be situate, for the inspection of all persons interested in such land, and shall forthwith cause notice to be given where the said copy may be inspected, and shall also in such notice appoint some convenient place, and such times as they shall think necessary (the first not earlier than twenty-one days from the first giving of such notice), for holding a meeting to hear objections to any allotment, direction, determination, or matter in the report; and the commissioners or some assistant commissioner, at such meeting as aforesaid, shall hear and determine any objections which may be then and there made to any such allotment, direction, determination, or matter by any person interested therein, or adjourn the further hearing thereof, if they or he shall think proper, to a future meeting, and may, if they or he shall see occasion, direct any further valuation or survey of the land or any part thereof, and take such other measures for ascertaining the justice and propriety of the determinations and directions of the valuer, as to the commis-

sioners or assistant commissioner shall seem proper, and from time to time, if they or he shall see occasion, fix further meetings for the hearing and determining of objections, of which further meetings, when not holden by adjournment, notice shall be given in manner hereinbefore directed with regard to the original meeting; and when the said commissioners or assistant commissioner shall have heard and determined all such objections, and made such enquiries as the commissioners shall think fit in relation thereto, the commissioners shall approve such report, or cause the allotments, directions, determinations, and matters therein mentioned, or any of them, to be amended, as they shall see occasion.

Valuer's Award.

CIV. And be it enacted, that after such proceedings as aforesaid shall have been had, and all such objections to such report (if any) shall have been finally disposed of, and such amendments (if any) shall have been made in the allotments, directions, and matters therein contained as aforesaid, the valuer, under the direction of the commissioners, shall cause to be drawn up and engrossed on parchment the award in the matter of such enclosure, which shall be signed by the valuer, and shall describe the boundaries, if any, which shall have been

Award to be
drawn up by
the valuer,

ascertained and set out under the provisions herein-before contained, and shall contain or set forth the report of the valuer, or the allotments, exchanges, partitions, directions, and matters contained in such report, if so approved as aforesaid, or such allotments, exchanges, directions, and matters therein contained as the same shall have been amended as aforesaid, and shall contain a declaration whether all or any and which of the mines, minerals, stone, and other substrata shall or shall not have been included in the estimate of the right and interest of the lord in the soil (in respect of which any allotment shall have been made to him), and the valuer shall annex to such engrossment the map referred to by such report; and the commissioners shall confirm such award, with the date of such confirmation thereunto annexed, under their hands and seal.

and confirmed
by the com-
missioners.

Confirmation
of award to
be conclusive
evidence that
the direc-
tions of this
Act have
been obeyed.

CV. And be it enacted, that such confirmation as aforesaid shall be conclusive evidence that all the directions of this Act in relation to such award and to every allotment, exchange, partition, and matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, shall have been obeyed and performed; and no such award shall be impeached by reason of any mistake or informality therein, or in any proceeding relating thereunto, or on account of

any want of any notices or consents required by this Act, or on account of defects or omissions in any previous proceeding whatever in the matter in the enclosure; and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever.

CVI. And be it enacted, that the several allotments which shall upon any enclosure under this Act be allotted to the several persons who shall be entitled to the same shall when so allotted be and be taken to be in full bar of and satisfaction and compensation for their several and respective lands, rights of common, and all other rights and properties whatsoever, not excepted or reserved by this Act or by the award in the matter of such enclosure, which they respectively had or were entitled to in and over the said lands immediately before such enclosure; and that from and immediately after the confirmation of the award by the commissioners, or at such earlier time as the valuer, with the approbation of the commissioners, shall by notice on the church door direct, all rights of common, and all rights whatever by the enclosure intended to be extinguished, belonging to or claimed by any person whomsoever, in or upon such lands, shall cease, determine, and be forever extinguished.

Allotments
to be in com-
pensation of
previous
rights.

Supplemental Order.

Allotments
may be sub-
divided by
supplemental
order.

CVII.* Provided always, and be it enacted, that when any award, so confirmed as aforesaid, shall not have distinguished the several tenures of any of the lands therein mentioned, or the different estates or titles for or under which the same shall be held, or shall have set out and awarded an aggregate allotment in any case in which there should have been set out and awarded several and distinct allotments, it shall be lawful for the commissioners, at any time within two years after the confirmation of the award, upon request in writing to them made by any person interested in any such aggregate allotment, to do all such Acts as may be necessary for supplying such omission, and for subdividing such aggregate allotment, and for that purpose to examine witnesses, and proceed as if the said award had not been confirmed, and by any order or instrument under their hands and seal to subdivide any aggregate allotment into separate allotments, and to distinguish and set out the allotments and lands held by different tenures, and also the allotments and lands held by, for, or under different estates or titles respectively, in the same manner as by this Act is authorised and required

* See note to sect. 152.

to be done in cases where such allotments and lands are directed to be ascertained, distinguished, and set out by the valuer; and every such separate instrument shall have the same power and effect as if it were contained in the said award: and such instrument shall be engrossed, and deposited with the award, and shall thenceforth be deemed to be part thereof to all intents and purposes; and all the expenses which shall be reasonably incurred in or about any such subsequent inquiry or separate instrument as aforesaid, and the engrossment thereof, shall be paid by the party who shall have requested the commissioners to make and execute the same, or by his executors or administrators.

Management of Allotments for Labouring Poor.

CVIII. And be it enacted, that the allotment which upon any inclosure under this Act shall be made for the labouring poor shall be under the management of the incumbent of the parish or ecclesiastical district in which such allotment shall be situate (or the officiating minister for the time being nominated by the incumbent for that purpose), the churchwarden, if there be but one, or (if there be more than one) one of the churchwardens for the time being of such parish, and two other persons who shall be rated to the re-

Allotment for the labouring poor shall be managed by the allotment wardens.

lief of the poor in such parish ; and such churchwarden, where there is more than one churchwarden, shall be yearly named, and such two other persons shall be yearly chosen and appointed, at the same time, and by the same persons, and in the same manner, as the overseers of the poor for such parish shall be chosen and appointed, and shall continue in office in like manner until the next appointment of overseers, or until others are named and chosen and appointed in their stead ; and such incumbent (or officiating minister), churchwarden, and two other persons for the time being shall be styled "the allotment wardens" of the parish, and shall manage and let the said allotment as herein-after provided, and all things by this Act authorized to be done by such allotment wardens may be done by any two of them, and in the event of the death or retirement from office of any one or more of the said allotment wardens, the surviving or continuing wardens may act as if no such vacancy had happened.

Such allotments how to be left.

CIX. And be it enacted, that the allotment wardens shall from time to time let the allotment under their management in gardens not exceeding a quarter of an acre each to such poor inhabitants of the parish for one year, or from year to year, at such rents, payable at such times, and on such terms and conditions, not

inconsistent with the provisions of this Act, as they shall think fit: provided always, that the commissioners may frame such regulations, not inconsistent with the provisions of the Act, for the letting of such allotments as aforesaid, as they may think advisable, and such regulations shall be obligatory on the allotment wardens during five years from the date thereof or during such shorter period as the commissioners shall direct: provided also, that the gardens so to be let shall be let free of all tithe or tithe rent-charge (if any), rates, taxes, and assessments whatsoever, and shall before the first letting thereof, and once at least in every ten years after such first letting, be valued by a competent person to be appointed by the allotment wardens for that purpose, who shall estimate the full rent which the same would be worth to be let by the year for farming purposes, all tithes or tithe rent-charge, rates, taxes, and assessments, being borne by the landlord, and shall verify such valuation by solemn declaration under the statute; and the rent at which the same gardens respectively shall be let shall be not below the full yearly value of the land according to the last of such valuations; and the allotment wardens shall, for the purposes of all rates and taxes, be deemed the occupiers of such allotment, and shall pay all rates and taxes, tithes and tithe rent-charge (if any), in respect thereof: pro-

vided always, that no building whatsoever shall, under any such letting as aforesaid or otherwise, on any pretence, be erected for or used as a dwelling on any such garden or on any part of any such allotment; and in case any such building shall be erected or used as aforesaid, contrary to this provision, the allotment wardens shall forthwith pull down the same, and sell and dispose of the materials thereof, and the produce of such sale shall be applicable in like manner as the rents of such gardens.

Recovery of
gardens on
nonpayment
of rent, &c.

CX. And be it enacted, that if the rent reserved upon the letting of any garden by the allotment wardens shall at any time be in arrear for forty days, or if at any time during the tenancy, being not less than three calendar months after the commencement thereof, it shall appear to the allotment wardens that the occupier of such garden shall not have duly observed the terms and conditions of his tenancy, or shall have gone to reside more than one mile out of the parish, then and in every such case the allotment wardens shall serve a notice upon such occupier, or in case he shall have gone to reside out of the parish shall affix the same to the door of the church of the parish, determining the tenancy at the expiration of one month after such notice shall have been so served or affixed, and thereupon such tenancy shall be determined accordingly: pro-

vided always, that in every such case the allotment wardens or their incoming tenant shall pay to the occupier whose tenancy shall have been so determined a fair recompence in money for any crops (not being crops prohibited by the terms of such tenancy) which may be growing on such garden at the time of such determination, and for any manure left on such garden, or any benefit accruing from the manuring of such garden to the wardens or their incoming tenant; and the justices to whom application may be made for a warrant to give possession of such garden shall settle the amount of such recompence, in case the parties differ about the same, and stay the execution of such warrant until the same shall have been paid or tendered, or (in case such occupier be absent) until the payment thereof shall have been secured to the satisfaction of such justices.

CXI. And be it enacted, that in case upon the determination of any such tenancy as aforesaid, the occupier of any such garden shall refuse to quit and deliver up possession thereof, or if any other person shall unlawfully enter upon, take, or hold possession of any such garden, or of any part of such allotment, the allotment wardens may recover possession according to the mode prescribed by an act passed in the second year of the reign of her Majesty Queen Victoria, intituled "An Act to facilitate the

Possession.
how to be
recovered
from tenant
holding over.

1 & 2 Vict.
c. 74.

Recovery of Possession of Tenements after due Determination of the Tenancy," in such and the same manner as if the said wardens were landlords or a landlord, and as if such over-holding occupier or other person were a tenant neglecting or refusing to quit and deliver up possession, within the meaning of the last-mentioned act.

Rents of allotment how to be applied.

CXII. And be it enacted, that all rents payable in respect of the allotment under the management of the allotment wardens shall be payable to such wardens, who shall have the same remedies for recovery thereof by distress and otherwise as if the legal estate of and in such allotment were vested in them under this Act; and such rents shall be applicable, in the first place, to the payment of all rates, taxes, tithes, tithe rent-charge, and of the rent-charge charged on such allotment under the provisions of this Act, and of all expenses incurred by the allotment wardens in the execution of their trusts and powers under this Act; and the residue, if any, of such rents, shall be paid to the overseers of the poor, in aid of the poor rates of the parish, and be applicable in the same manner as and subject to all the provisions concerning the monies assessed for the relief of the poor.

Regulated Pastures.

CXIII. And be it enacted, that it shall be lawful for the commissioners, on the application in writing of persons interested in any land which shall be directed to be enclosed under this Act whose interest shall exceed in value one half of the whole interest in such land (such application to be made at any time before the instructions to the valuer shall have been delivered to him under the seal of the commissioners, as herein-before provided), to direct such land or any part thereof to be converted into and used as a regulated pasture, to be stocked and depastured in common by the persons interested therein, in proportion to their respective rights and interests as the same shall be determined on the examination of claims; and in case part of such land only shall be so directed to be stocked and depastured in common, the valuer shall, subject to the instructions which shall be given to him under the provisions of this Act, ascertain and set out the part which shall be so used as a regulated pasture, and shall direct how and at whose expense the same shall be fenced and divided from the residue of such land; and the valuer acting in the matter of such enclosure shall, in every case where land shall be so directed to be used as a regulated pasture, ascertain and allot the respective stints or rights of pasturage (specifying

Regulated
pastures may
be set out.

the respective numbers of the respective kinds of stock or animals to be admitted to the pasture in respect of such respective stints or rights of pasturage, with such option as to equivalent numbers of the respective kinds of stock and animals as he shall think just, and, if he shall think fit, specifying the time during which such stock or animals may be kept on the pasture,) as he shall adjudge and determine to be proportionate to the value of the respective rights and interests of the persons interested as aforesaid; and the commissioners may frame such directions as they shall think fit for guiding the valuer in the correct specification of such stints or rights: provided always, that in every case in which part only of the land subject to be enclosed under this Act shall be so directed to be used as a regulated pasture, and the residue thereof to be divided and allotted in severalty, it shall be lawful for such valuer, having regard to the convenience of the persons interested in such land, to award to any such person either a stint or right of pasture, or an allotment in severalty only, or both a stint or right of pasture and an allotment in severalty, so as such stint or right only, or such allotment only, or (as the case may be) such stint or right and allotment together, be in the judgment of the valuer proportionate to the right and interest in respect of which the same shall be awarded: provided also, that in any case in which it

shall appear to the valuer that the proportionate right or interest of any person is too small to be conveniently compensated by a stint or right of pasture, or that it is not practicable wholly to compensate such person by a stint or right of pasture, and the circumstances of the enclosure will not admit, in the judgment of the valuer, of an adjustment or compensation by an allotment in severalty, it shall be lawful for such valuer, for the purpose of compensation or adjustment, to direct a sum of money to be paid to such person in lieu of or (as the case may require) in addition to the award of a right of pasture or stint; and such sum of money shall be paid out of the monies applicable to the payment of the expenses of the enclosure.

CXIV. And be it enacted, that all the provisions and powers herein-before contained in relation to public and private roads, ways, and works, and all other the powers, provisions, and directions, penalties and forfeitures, applicable to the case of an enclosure under this Act, and the provisions and directions concerning examination of claims, and the rehearing thereof, and the report of the valuer, and the amendment of the matter thereof, and the award, and the confirmation and effect of the award, shall be applicable to the case where the land subject to be enclosed shall be directed to be used as a regulated pasture; and the word

Conversion
into regu-
lated pasture
to be deemed
an enclosure.

“enclosure” shall in every case in this Act where the context is not repugnant to such construction include the conversion of land subject to be enclosed into such regulated pasture, and the proceedings in relation thereto.

Rule of rating
to be estab-
lished.

CXV. And be it enacted, that in every case in which land shall be directed to be converted into and used as regulated pasture under this Act, the valuer acting in the matter of the enclosure shall determine and direct the proportionate shares or aliquot parts which the respective owners for the time being of the several stints or rights of pasture shall be liable to pay of any sum of money which shall be raised by way of rate on such owners under the provisions of this Act; and such determination and direction, in case the same shall be approved, or as the same may be amended by the commissioners, shall be for ever after observed in every rate to be made under the provisions of this Act, and shall be the rule also according to which the proportionate values of the stints shall be determined in taking the votes of the owners of stints under the provisions hereinafter contained.

Property of
soil of regu-
lated pas-
tures.

CXVI. And be it enacted, that the right of soil of and in all land which shall be converted into regulated pastures shall, subject to the right of the lord of the manor to all or any of

the mines, minerals, stone, and other substrata, where the same shall be reserved to him under this Act, and to the other rights given or reserved by this Act and the award in the matter of such enclosure, be vested in the persons who under the directions and determinations of such award shall be the owners of the stints or rights of pasture therein, in proportion to the shares or aliquot parts which such stints shall be thereby declared liable to of any rate under this Act, as tenants in common.

CXVII. And be it enacted, that where any land shall have been converted into a regulated pasture under the provisions of this Act a meeting shall be called by the commissioners of the owners of the stints or rights of pasture, at such time after the confirmation of the award as the commissioners shall by notice on the church door appoint; and the major part in value of such owners present by themselves, or their agent anthorized in [this behalf, at such meeting, shall elect a fit person or persons to be field reeve or reeves of such regulated pasture; and every field reeve so to be elected as aforesaid, or to be elected or re-elected at any subsequent meeting, shall continue in office until the expiration of fifteen days after the day of the annual meeting of such owners then next following, and no longer, unless he shall be re-elected at such annual meeting; and such

Election of
field reeves.

owners shall ever after such first meeting meet for the election of a field reeve or field reeves on the first Monday in February in every year; and the owners assembled at such meetings shall from time to time fix, increase, or diminish the salary or payment to be made to every such field reeve, and may appoint or authorize any field reeve to appoint and employ herds and assistants, as such owners may think fit; and any such field reeve may be removed by four fifths in value of the owners of stints present by themselves or their agents authorized in this behalf at any meeting called for the purpose by fourteen days' notice on the church door under the hands of any two such owners of stints; and in case any such field reeve shall die while he shall hold such office, or shall be removed as aforesaid, it shall be lawful for the majority in value of owners of stints or pastures present as aforesaid at any meeting which upon such vacancy any two owners may call by fourteen days' notice on the church door, to appoint a field reeve in his place, who shall hold the office until the expiration of fifteen days after the then next annual meeting; and a certificate in writing under the hands and seals of two justices of the peace of the election of any field reeve (which certificate any two justices of the peace are authorized, if they think fit, to give, on the request and upon the declaration of any owner of such stints as the agent of any such

owner present at the meeting at which the election shall have taken place,) shall in all matters and proceedings whatsoever in which any acts done by any field reeve in the execution of his office shall be in question be evidence that he was duly appointed field reeve.

CXVIII. And be it enacted, that the field reeve or reeves for the time of being of every such regulated pasture shall, subject to such orders and instructions in writing as may from time to time be agreed on by the majority in value of the owners of such stints as aforesaid, at their yearly meetings, regulate the times in each year during which stock or animals shall be admitted to and excluded from such regulated pasture, and shall maintain and keep in order the fences, gates, ditches, drains, watercourses, embankments, jetties, and weirs, or make any new fences, gates, ditches, drains, watercourses, embankments, jetties, or weirs, and do all works necessary for the maintenance and improvement and good order of such regulated pasture, and shall and may distrain all stock and animals found thereon contrary to the regulations of such pasture, and do all other acts for the maintenance and improvement of such regulated pasture, and the convenient use and occupation thereof, as the field reeve or reeves, subject to such instructions as aforesaid, may think fit; and where there shall be any

Duties of
field reeves.

buildings on such regulated pasture, or where the majority in value of the owners of stints at any yearly meeting shall direct that any buildings for the shelter or stall-feeding of stock or animals be erected thereon, such field reeve or reeves shall or may maintain and keep in repair such buildings, or cause such buildings to be erected, in pursuance of such direction, and let the same from year to year, or, under such instructions as aforesaid, for any term of years, and shall receive the rents thereof; and such rents shall be applicable, in the first place, to the same purposes as the rates herein-after authorized to be raised on the owners of stints are made applicable, and the residue (if any) shall be paid to the owners of stints in proportion to the respective liability of their stints to such rates.

Provision for
rateable in-
crease or di-
minution of
rights.

CXIX. And be it enacted, that when it shall appear to the majority in value of the owners of stints present at any annual meeting that the condition of the pasture would admit of an increase of the respective rights of pasture thereon, or would require a diminution of such respective rights, it shall be lawful for such majority of the owners so present to direct that the respective number of stock or animals to be admitted to the pasture in respect of the several rights be increased, or, as the case may be, diminished, rateably, to such extent as

they shall think fit: provided always, that in case it shall happen that the right of any such owner shall not be sufficient to admit of a rateable increase or diminution, such annual money payment shall be made to such owner in lieu of increase of his right, or, as the case may be, charged on such owner in lieu of the diminution of his right, as such majority shall award, or in case the person to or on whom such money payment shall be awarded or charged shall think the sum awarded insufficient, or the sum charged excessive, then as any two justices of the peace shall, upon the complaint of such person, and after summons of the field reeve or one of the field reeves of such pasture (which may be in the form in the schedule to this Act), and on hearing in a summary way the matter in difference, think reasonable and order to be paid; and such order may be in the form in the schedule to this Act; and every such money payment payable in lieu of increase of right shall be paid annually by the field reeve out of the monies raised by the rate made for the expenses of such regulated pasture; and the money charged on any such owner shall be recoverable as a rate on owners of stints is hereby made recoverable; and all annual payments payable as aforesaid shall be payable on the first Monday in February in every year.

Expenses to
be raised by
rate.

CXX. And be it enacted, that all salaries and allowances to field reeves and other persons, and all expenses in and about the management of every such regulated pasture, and the repairs and erection of buildings thereon, under the directions of such meetings of owners as aforesaid, and all other expenses of such regulated pasture shall be paid and defrayed by the owners of the respective stints therein; and for that purpose it shall be lawful for the field reeve or one of the field reeves, under the directions of any such meeting of owners, from time to time to make a rate on the respective owners for such sum as the majority of owners present at such meeting shall think requisite; and every such rate shall be apportioned and paid by the owners according to the rule of rating established for such regulated pasture, and shall be paid to the field reeve on demand thereof, and in case the same shall not be paid within fourteen days after demand thereof, shall be recoverable by distress; and it shall be lawful for any field reeve to exclude from such regulated pasture the stock or animals of any owner or his tenant whose proportion of the rate shall be in arrear and unpaid for fourteen days after demand thereof, until the proportion of such rate so in arrear shall be fully paid; and any such demand or distress may be made of or on the occupier of any such stint as if the occupier were the owner liable to the payment of such rate, and such rate may be paid by any such occupier on demand thereof,

and the money so paid by such occupier shall be deemed a payment on account of his rent, and shall be allowed by his landlord accordingly.

CXXI. And be it enacted, that where any land shall be already occupied as a gated or stinted pasture, and any of the persons interested in such gated or stinted pasture whose interests shall not be less in value than two thirds of the whole interest therein, shall be desirous that such gated or stinted pasture should be subject to the provisions of this Act, concerning regulated pastures, without being subject to the other provisions concerning lands subject to be inclosed under this Act, and shall make application in writing to the commissioners to take proceedings for that purpose, it shall be lawful for the commissioners, after making such inquiries as may appear to them necessary, to cause to be ascertained by any valuer to be appointed or approved by the commissioners for that purpose the proportionate rights and interests of the several persons interested in such pasture, and also the respective rights of pasture to which, having reference to the productiveness of such gated or stinted pasture, the several persons interested therein may, in the judgment of such valuer, be entitled; and such valuer shall determine and direct, as herein-before mentioned, the proportionate liability to rates under this Act of the occupiers of stints or rights of pasture, and in like man-

Power to
apply the Act
to pastures
already
stinted.

ner as in case of the conversion into regulated pasture of land subject to be enclosed upon an enclosure under this Act; and the commissioners shall hear, or cause to be heard by an assistant commissioner, any objections to the determinations of claims by and to the report of the valuer respectively, and approve or amend such determinations and such report respectively as they shall think fit; and the valuer, under the direction or with the approval of the commissioners, shall frame and cause to be ingrossed an award setting forth such draft award, and the matter of such report, and the commissioners shall confirm the same, with the date of the confirmation, under their hands and seal*; and from and after the confirmation of such award such gated and stinted pasture shall be subject to all the provisions herein contained concerning land subject to be enclosed, converted into and used as regulated pasture, and shall be rateable under such provisions according to the rule of rating as set forth in such award; and such award shall be as binding and conclusive as if the same had been made and confirmed on an enclosure under this Act.

* This will be found a very valuable provision. An inexpensive machinery for the regulation and improvement of these pastures has been long required, and must greatly increase the value of such property throughout the kingdom. A private act of parliament was before this statute the only resource.

CXXII. And be it enacted, that all the ex-
 penses of or attending the proceedings for sub-
 jecting lands already used as gated or stinted
 pasture to the provisions of this Act, concerning
 lands subject to be enclosed, converted into or
 used as regulated pasture, shall be paid and
 borne by the persons interested therein, in pro-
 portion to their respective liabilities to rates
 under this Act, according to the rule of rating
 established in respect of such gated or stinted
 pasture under this Act, and shall be paid at
 such time and place and to such persons as the
 valuer, with the approbation of the commis-
 sioners, signified by writing under their hands
 and seal, shall direct, and shall be recoverable
 in such and the same manner as the expenses
 of an enclosure made in pursuance of this Act.

Expenses of
 application
 of Act to
 pastures
 already
 stinted.

Power to enter Land for Surveys.

CXXIII. And be it enacted, that for sur-
 veying and valuing any land to be enclosed or
 otherwise dealt with under this Act, and for
 the other purposes of this Act, it shall be lawful
 for the commissioners, or an assistant commis-
 sioner or valuer, or any person or persons to be
 appointed by such commissioners, assistant
 commissioner, or valuer, at any time after ap-
 plication has been made to the commissioners
 to sanction an enclosure, or to certify to the ex-
 pediency of an enclosure, as the case may be,

Power to
 enter land
 for surveys,
 &c.

to make any survey, admeasurement, plan, or valuation, with assistants and servants, and at any time or times whatsoever, until the enclosure or other proceedings under this Act shall be completed, to enter into, view, and examine, survey or admeasure, all and every part of the land to be enclosed or dealt with, and to do or cause to be done any act or thing necessary for putting this Act into execution.

Expenses of Enclosures.

Expenses of
enclosures.

CXXIV. And be it enacted, that the allowances and payments to be made to and by the valuer, which shall have been audited and approved by or under the directions of the commissioners, and all other the expenses of every enclosure, except the allowances and salaries to the commissioner who is to have a salary, and to the assistant commissioners, secretary, clerks, messengers, and officers of the commissioners, and the travelling and other expenses of the commissioners and assistant commissioners, and except any expenses which the commissioners or assistant commissioner, or any court under the powers of this Act, shall order to be otherwise paid, shall be borne and defrayed by the several persons interested in the lands to be enclosed (except the surveyors of highways, churchwardens and overseers, and persons to

whom lands shall be allotted for public purposes, in respect of the allotments herein-before authorized or directed to be made to them respectively) in such shares and proportions, and shall be paid at such time and place, or respective times and places, and to such persons, as the valuer, with the approbation of the commissioners, signified by writing under their hands and seal, shall direct; and such valuer shall give notice requiring payment of the respective shares and proportions of such expenses on the church door, and shall give to all persons so liable, who shall not reside in the parish in which the land enclosed or any part thereof shall be situate, and whose respective places of abode shall be known to the valuer, notice by letter sent by the post of the sums they respectively shall be liable to pay, at least fourteen days before the time appointed for such payment; and the valuer shall from time to time make estimates of all such expenses, and raise the amount of such estimates at such times as he shall, with such approbation of the commissioners deem proper, either before or after the confirmation of the award.

CXXXV. Provided always, and be it enacted, that before the commissioners shall approve the estimates of such expenses they shall submit the same to a meeting of persons interested, called after seven days' notice, and shall take

Estimates of expenses to be approved of at public meeting.

into consideration any representation with respect to such estimates which may be made to them on the part of the majority of the persons present at such meeting.

Remedies in
case of non-
payment of
expenses.

CXXVI. And be it enacted, that if any person shall refuse or neglect to pay his proportion of such expenses within such time and to such person as the valuer shall appoint, it shall be lawful for the valuer to recover the same, together with lawful interest, to be computed from the day on which the same ought to have been paid, by action at law in his own name in any of her Majesty's courts of record at Westminster, or it shall be lawful for him, by warrant directed to any person whomsoever, to cause the same, with such interest thereon as aforesaid, to be levied by distress, or it shall be lawful for the valuer, or any person authorized by him, immediately after such neglect or refusal, to enter into and upon the premises so to be allotted to such person, and demise the same, or to demise any stint or right of pasture allotted to such person, and receive the rents and profits thereof respectively, until thereby or otherwise such share or proportion, with lawful interest as aforesaid, and also all the costs and expenses attending such entry upon and demise, and receipt of the rents and profits of the said premises, shall be fully paid and satisfied: provided always, that no such

at ion at law as aforesaid shall be brought by the valuer against any person for his proportion of such expenses as aforesaid, nor shall any proceeding be taken to levy any such proportion of expenses by distress as aforesaid, before the expiration of thirty days after notice in writing that such proportion of expenses is in arrear, and requiring payment thereof, shall have been given to the person liable to pay the same, or left at the usual place of abode of such person.

CXXVII. Provided always, and be it enacted, that if at any time after the allotments shall have been staked out it shall appear to the valuer, "either before or after the confirmation of the award, that the money to arise by any previous rates will not be sufficient to defray the expenses aforesaid, the deficiency shall, with such approbation of the commissioners as aforesaid, be made up and raised from time to time by a rate to be made and levied upon the several persons interested in the lands to be enclosed (except as aforesaid), in such shares and proportions, within such time, and to be paid to such persons as the valuer shall from time to time direct; and in case any persons herein-before made subject to the payment of any money toward such expenses shall neglect or refuse to pay his share or proportion of any such rate within the time appointed for that purpose, or at any time after such demand,

Power to make additional rate.

the same shall be levied and recovered in the manner directed by this Act with respect to the previous rate.

Removal of Valuer.

Commissioners may remove valuers.

CXXVIII. And be it enacted, that if any valuer or surveyor chosen or appointed to act in the matter of any enclosure or other matter under this Act shall, before his duties shall be fully performed, refuse to attend to, or become by sickness or otherwise incapable to act in such matter, or by writing under his hand desire to be discharged from the office of valuer or surveyor respectively, or shall in the judgment of the commissioners neglect his duties, or misconduct himself in his office, or become or be found incompetent or unfit to act as a valuer or surveyor under this Act, it shall be lawful for the commissioners, by order under their hands and seal, to remove him from the office of valuer or surveyor, as the case may be; and if any valuer or surveyor shall be so removed, or shall die, it shall be lawful for the commissioners, by order under their seal, to appoint a valuer or surveyor in his stead, and every valuer and surveyor so appointed shall have the same powers as if he had been chosen at a meeting of the persons interested in the land in manner herein-before directed.

Incapacity of Valuer to Purchase.

CXXIX. And be it enacted, that no valuer who shall have acted in the matter of any enclosure shall be capable of being a purchaser of any land within the parish in which the lands to be enclosed, or any part thereof, shall be situate, until the expiration of seven years * after the confirmation of the award in such enclosure.

Valuer not to purchase lands in the parish for seven years after the award.

Repayment of Expenses.†

CXXX. And be it enacted, that it shall be lawful for the commissioners, having regard to the time and labour and expenses of the assistant commissioners and all other persons, if any, specially employed and paid by the commissioners in or about any enclosure, exchange, division, partition, or other proceeding under this Act, by any order under their hands and seal, to order and declare that a sum, in such order to be mentioned, be paid to the commissioners in respect of the salary, allowance, and

Repayment to consolidated fund.

* By the General Enclosure Act, 41 Geo. 3. c. 109. s. 2. an enclosure commissioner was placed under a similar disability for five years.

† It has been noted already (see note to Section 25.), that the commissioners' power to charge expenses appears to be limited to cases in which enclosures are completed, and does not apply to preliminary enquiries which do not eventuate in an enclosure. Such is the interpretation understood to be put upon this clause by the framers of the bill.

expenses of the assistant commissioners and other persons, if any, so specially employed in or about such enclosure, exchange, division, partition, or other proceeding; and the commissioners shall by such order declare such sum to be charged on the persons interested in the land to be enclosed, or to which such proceeding shall relate, in such shares as they shall think just, and shall appoint a time for payment thereof; and the same shall be raised in the same manner as the expenses of the enclosure, or of subjecting the land to the provisions concerning regulated pasture, are directed to be raised under this Act, and be deemed part of the expenses of the enclosure or matter aforesaid, or, in the case of an exchange, division, or partition, in the same manner as the expenses of such exchange, division, or partition, and when raised shall be paid to the commissioners, who shall forthwith pay the same into her Majesty's Exchequer, to be carried to the account of the Consolidated Fund.

Expenses of Parties.

Persons attending meetings to pay their own expenses.

CXXXI. Provided always, and be it enacted, that the several persons interested in the enclosure or other proceeding under this Act, and their respective agents, shall pay their own expenses whenever they shall attend any of the meetings to be held in the matter of any enclosure.

Expenses of Witnesses.

CXXXII. And be it enacted, that the commissioners or assistant commissioner acting in the matter of any enclosure, or in any inquiry into the expediency or in expediency of any proposed enclosure, where they or he may see fit, may order such expenses of witnesses, and of the production of any books, deeds, court rolls, and writings, maps, plans, and surveys, or copies thereof, and all other expenses (except the salary or allowance to any assistant commissioner) incurred in the settlement of any suit or difference, or in the hearing and determining any objection or matter whatever before the said commissioners or any assistant commissioner, to be paid by such parties interested in the production thereof respectively, or in the event of such suit, difference, objection, or matter, or in any such inquiry, by or in such proportions as the commissioners or assistant commissioner shall think fit and reasonable; and the commissioners may, when they shall see occasion, require such security to be given by persons making application for any inquiry under this Act, for the payment by such persons of the expenses of or occasioned by such inquiry, as the commissioners may think fit.

Expenses of
witnesses.

Mortgage of Allotments.

Power to
mortgage
allotments.

CXXXIII. And be it enacted, that it shall be lawful for the respective persons interested in allotments in severalty or allotments of stints or rights of pasture respectively to be made under this Act, being tenants for life or in tail, or for any other estate of freehold or inheritance, and also for the husbands, guardians, trustees, committees, or attornies of any of the proprietors, being under coverture, infants, lunatics, idiots, or under any other disability or incapacity, or beyond the seas, or by the persons acting as such guardians, trustees, committees, or attornies respectively, and for the trustees or feoffees for charitable, parochial, or other uses, or the majority in number of them, in respect of any lands held by them in trust for any charitable, parochial, or other uses, (with the consent of the commissioners, testified in writing under their hands and seal,) and for the incumbent of any ecclesiastical benefice, with the consent in writing of the bishop of the diocese and of the patron of such benefice, from time to time to charge their respective allotments with any money not exceeding, as to any allotment in severalty, five pounds per acre, towards their respective proportions of the enclosure expenses, and for securing the repayment of such money, with interest, to mortgage or demise the said allotments unto or in trust for

any person who shall advance any money for any term of years, but so that every such mortgage or demise be made with a condition to cease or upon trust to be surrendered or assigned when the money thereby to be secured, with all interest thereon, shall have been fully paid, and so that in every such mortgage or demise which shall be made by or on behalf of any person entitled to any such allotment for the term of his natural life there be contained a covenant to pay and keep down the interest of the money to be secured during his life, in such manner that no person afterwards becoming possessed of such lands shall be subject or liable to pay any larger arrear of interest than for six months previous to the time when the title of such person shall accrue or commence; and every incumbent of a benefice by whom such mortgage or demise shall be made shall keep down the interest on the money to be secured, or on so much thereof as shall remain owing, and shall repay, in reduction of the principal, one thirtieth part of the money originally secured, at the expiration of the term of one year from the time of making such mortgage, and a like sum at the expiration of each succeeding term of one year, until the whole be repaid; and every such mortgage or demise shall be valid in the law for the purposes thereby intended; and every such mortgagee and his assigns shall have the like remedies in case of

nonpayment of the monies thereby secured as in the case of other mortgages of the like nature.

Sale of Allotments.

Power to sell
parts of allot-
ments.

CXXXIV. And be it enacted, that it shall be lawful for the commissioners, on application made to them in writing by any of the proprietors of allotments to be made by virtue of this Act, or by any of the husbands, guardians, trustees, committees, or attornies of or for any of such proprietors, being under coverture, infants, lunatics, idiots, or under any other disability or incapacity, or beyond the seas, or by the persons acting as such guardians, trustees, committees, or attornies respectively, or by any of the said proprietors, being tenants in tail or for life, or by any trustees or feoffees for charitable, parochial, or other uses, or by the majority in number of them, or by any incumbent of an ecclesiastical benefice in right of which an allotment may have been made, and the bishop of the diocese and the patron of such benefice, to direct a sale of any part of any such allotment, for raising a sum of money sufficient to defray the proportionable part of the expenses which shall in such rates be charged upon such parties, and of the expenses of making and completing such sale: provided always, that in all cases in which the monies so raised by any such sale shall not be equal to the

money which might be borrowed or charged on such allotment as aforesaid, it shall be lawful for the proprietor, or the person herein-before authorised to direct a sale on behalf of the proprietor, part of whose allotment shall be sold as aforesaid, to charge his allotment with any sum not exceeding the difference.

CXXXV. And be it enacted, that such sales shall be made by the valuer, with the approbation of the commissioners, in the same manner and subject to the same regulations as are herein-after prescribed in respect of the sale of part of the land subject to be enclosed towards defraying the expenses of the enclosure; and every part of an allotment for which the full purchase money shall be paid shall be conveyed by the commissioners, at the expense of the purchaser, as he shall appoint, and shall be enclosed and held by such purchaser in severalty: provided always, that nothing herein contained shall enable the commissioners to convey any allotments set out by them as copyhold or customary as freehold, but such copyhold or customary allotments shall be held by the purchaser thereof by, under, and subject to the same rents, suits, and services as such allotment would have been held in case no such sale had been made.

Sales of parts of allotments how to be made.

CXXXVI. And be it enacted, that the receipt of the commissioners shall be a sufficient

Commissioners to receive and

apply purchase money.

discharge to the purchaser for the said purchase money; and such purchase money shall be applied by the commissioners in or towards defraying the costs and expenses for raising which such sale shall have been made; and the surplus (if any) shall be paid to the parties from whose allotments such sale shall have been so made respectively; and the shares of such of them as shall be tenants in fee simple shall be paid to them respectively, and the shares of the other proprietors of such surplus money shall be applied and disposed of in manner herein-after directed.

Sale of Timber, and Application of Purchase Money.

Application of compensation money of parties under disabilities.

CXXXVII. And be it enacted, that when any money is, under the provisions of this Act, directed to be paid for the purchase of any timber or wood growing on any land which shall belong to any tenant for life or in tail, or to any feoffee in trust, executor, or administrator, husband, guardian, committee, or trustee, for or on behalf of any infant, idiot, lunatic, feme covert, or cestuique trust, or to any person whose lands are limited in strict or other settlement, or to any person under any other disability or incapacity whatsoever, or to any corporation, not being legally and equitably entitled to sell and dispose of such timber and wood, it shall be lawful for the valuer out of

such money to defray the proportion (if any) of the enclosure expenses which shall be charged upon the land, or any land held under the same title, on which such timber or wood actually grew, and also, with the approbation of the commissioners, to defray the expense of any permanent improvement, such as building, subdividing, dividing, draining, or planting, and the like, which shall in the judgment of the valuer be proper to be made, and shall be made under his direction, upon any land to be under the powers of this act allotted to such parties.

Surplus Monies arising from Sale of Allotments.

CXXXVIII. And be it enacted, that if the surplus of any such monies, or the surplus of any monies to arise from the sale of part of an allotment for raising money for expenses, where the same shall not be paid to the proprietors under the directions herein-before contained, shall amount to or exceed the sum of two hundred pounds, the same shall, with all convenient speed, unless the commissioners shall otherwise direct, under the provisions herein-after contained, be paid into the Bank of England in the name and with the privity of the accountant general of the Court of Chancery, to be placed to his account there ex parte the commissioners, pursuant to the method prescribed by an act passed in the twelfth year of the reign of his

Investment
of surplus
when 200*l.* or
upwards.

- late Majesty King George the First, intituled
12 G. 1. c. 32. “An Act for the better Securing the Monies
and Effects of the Suitors of the Court of
Chancery, and to prevent the Counterfeiting of
East India Bonds and the Endorsements thereon,
as likewise the Endorsements on South Sea
Bonds,” and pursuant to the general rules and
orders of the said court, and without fee or
reward, according to an act passed in the
twelfth year of the reign of his late Majesty King
12 G. 2. c. 24. George the Second, intituled “An Act to em-
power the High Court of Chancery to lay out
upon proper Securities any Monies, not exceed-
ing a Sum therein limited, out of the common
and general Cash in the Bank of England be-
longing to the Suitors of the said Court, for the
Ease of the said Suitors, by applying the In-
terest arising therefrom for answering the
Charges of the Office of the Accountant Gene-
ral of the said Court;” and shall, when so paid
in, there remain until the same shall, by order of
the said court, made upon a petition in a sum-
mary way by the parties who would have been
entitled to the rents and profits of the said land,
be applied to the following purposes or any of
them; (that is to say),

The redemption or discharge of the land tax
or of any debt or other incumbrance
affecting the same land, or affecting other
lands standing settled therewith to the
same or the like uses or trusts :

The purchase of other land, to be conveyed or settled upon the like uses or trusts, or such of them as shall be then existing undetermined or capable of taking effect.

CXXXIX. And be it enacted, that in the mean time and until such application shall be made the said money may, by order of the said court, to be made upon the like petition, be invested by the said accountant general in his name in the purchase of three pounds per centum Consolidated or three pounds per centum Reduced Bank Annuities, or of government securities; and the dividends or interest of such annuities or securities shall from time to time be paid, by order of the said court, to the parties who would for the time being have been entitled to the rents and profits of the lands so to be purchased, conveyed, and settled.

Payment of dividends in the mean time.

CXL. And be it enacted, that in case the surplus of any such monies as aforesaid shall be less than the sum of two hundred pounds, and shall exceed or amount to the sum of twenty pounds, the same shall, at the option of the parties who for the time being would have been entitled to the rents and profits of the said land, or their guardians or committees, in case of infancy, idiocy, lunacy, or other incapacity, with the approbation of the commissioners, to be signified in writing under their seal, be paid

Application of money under 200*l*.

into the Bank of England in the name and with the privity of the said accountant general of the Court of Chancery, and be placed to his account as aforesaid, in order to be applied in manner herein-before directed; or otherwise the same may be paid, at the like option and with the like approbation, to two trustees, to be nominated by the said parties, who for the time being would have been entitled to the rents and profits of the said land as aforesaid, such nomination to be approved of by the commissioners, and such nomination and approbation to be signified in writing under the hands (or common seal, as the case may be,) of the nominating parties, and under the seal of the commissioners; and in any case in which such monies shall amount to or exceed the sum of two hundred pounds, the same, if the commissioners shall so think fit and direct, shall in like manner be paid to trustees to be nominated and approved as aforesaid; and the money so paid to such trustees, and the dividends and produce arising therefrom, shall be by them applied in like manner as is herein-before directed with respect to money so to be paid into the Bank of England, but without obtaining or being required to obtain any order of the said court touching the application thereof.

Under 207.

CXLI. And be it enacted, that in case the surplus of any such monies as aforesaid shall be

less than twenty pounds the same shall be paid to the parties for the time being entitled to the rents and profits of the said land, for their own use and benefit ; or in case of infancy, idiotcy, lunacy, or other incapacity, then such money shall be paid to their guardians, committees, or trustees, for the use and benefit of the parties respectively entitled thereto.

Sale of Land for Expenses.

CXLII. Provided always, and be it enacted, Sale of land by valuer for expenses. that in case the valuer acting in the matter of any enclosure shall, under the instructions herein-before required in this behalf, proceed to raise all or any part of the expenses of the enclosure by sale of part of the land proposed to be enclosed, such valuer shall set out such parts of the land to be enclosed as he shall judge sufficient in value to defray the expenses aforesaid, and shall, from time to time as he shall find expedient, sell and dispose of the same by public auction or by private contract, with the approbation of the commissioners ; and the purchase monies to arise by such sales shall be paid into the hands of the commissioners, or as they shall direct, and shall be by them applied in discharging the said expenses.

CXLIII. And be it enacted, that upon every sale to be made by the valuer under the pro- Conveyances to be made by commission-ers.

visions of this act the commissioners shall sign and deliver to each purchaser a receipt for his purchase money, which shall be a sufficient discharge for the same; and upon receipt of the whole purchase money for any of the lands which shall be sold as aforesaid the commissioners shall convey such lands, and the fee simple and inheritance thereof in possession, by conveyance under their hands and seal, to such uses and in such manner as such purchaser shall direct; and after such conveyance the premises conveyed shall be freehold of inheritance, and shall be held to the uses and in manner expressed by such conveyance; and any such conveyance may be to the effect set forth in the schedule to this act, and shall be evidence of the regularity of the sale in pursuance of which such conveyance shall be made.

Application
of purchase
monies.

CXLIV. And be it enacted, that all such purchase monies as shall be from time to time raised or received by the commissioners by such respective sales as aforesaid shall, after payment of the charges and expenses attending such respective sales, be paid and applied by the commissioners towards the expenses of the enclosure; and the respective purchasers or other persons paying the same shall not in any manner be liable to see to the application, or be answerable for any misapplication thereof.

*Notice of Proceedings to be given to Reversioners.**

CXLV. And be it enacted, that the commissioners, before authorising or certifying the expediency of any enclosure, or determining any claim or matter, or approving any report or award, or in any other stage of the proceedings on any enclosure, or of the proceedings for subjecting any gated or stinted pasture to the provisions of this act concerning regulated pastures, if they shall see occasion, may require notice to be given, in any such manner as they shall direct, to the person next in remainder, reversion, or expectancy of an estate of inheritance in any lands, or to any other person to whom they may think notice ought to be given, and may by themselves or by some assistant commissioner hear and determine any objection which may be made by the person so next in remainder, reversion, or expectancy.

Notice may be given to reversioners.

Custody of Award.

CXLVI. And be it enacted, that two copies of every confirmed award shall be made, and sealed with the seal of the said commissioners, and one such copy shall be deposited with the

Copies of award to be made and deposited.

* It is understood that the commissioners will require that actual notice be given to reversioners wherever they are known or can be discovered by diligent inquiry. After they are satisfied that due diligence has been used, a public notice may be held sufficient.

clerk of the peace of the county in which the lands enclosed shall be situate, who is hereby required to deposit and keep the same among the records of the said county, so that recourse may be had thereto by any person interested in the premises, and the other copy shall be deposited with the church or chapel wardens for the time being of the parish in which the lands or the greater part thereof shall be situated, to be kept by them and their successors in office with the public books, writings, and papers of the parish, or shall be deposited with such other fit persons as the commissioners shall approve; and all persons interested therein may have access to and be furnished with copies of or extracts from any such copy, on giving reasonable notice to the person having custody of the same, and on payment of two shillings and sixpence for such inspection, and after the rate of three-pence for every seventy-two words contained in such copy or extract; and all such copies of and extracts from any such copy of any confirmed award as shall be furnished by the clerk of the peace shall be signed by the said clerk of the peace or his deputy, purporting the same to be a true copy; and every such copy and extract, so signed, shall be received in evidence without further proof thereof; and every recital or statement in such confirmed award or any sealed copy thereof shall be deemed satisfactory

evidence of the matters therein recited or stated.

*Exchanges of Lands not subject to be enclosed.**

CXLVII. And be it enacted, that it shall be lawful for the commissioners, upon the application in writing of the persons interested, according to the definition herein-before contained, in lands not subject to be enclosed under this Act, or in lands subject to be enclosed under this Act as to which no proceedings for an enclosure shall be pending, and who shall desire to effect an exchange of lands in which they respectively shall be so interested, to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands; and in case the commissioners shall be of opinion that such exchange would be beneficial, and that the terms of the proposed exchange are just and reasonable, they shall, unless notice of dissent to the proposed exchange shall be given, under the provision herein-after contained, cause to be framed, and confirmed under the hands and seal of the commissioners, an order of exchange, with a map or plan thereunto annexed, in which order shall be specified and shown the lands given and

Exchanges may be made of land not subject to be enclosed.

* Copyholds and customary lands are excluded from the operation of this clause.

taken in exchange by each person so interested respectively; and a copy of such order, under the seal of the commissioners, shall be delivered to each of the parties on whose application the exchange shall have been made; and such order of exchange shall be good, valid, and effectual in the law to all intents and purposes whatsoever, and shall be in nowise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the land taken upon every such exchange shall be and enure to, for, and upon the same uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the lands given on such exchange would have stood limited or been subject to in case such order had not been made; and all expenses with reference to such order and exchange, or the inquiries in relation thereto, or to any proposed exchange, shall be borne by the persons on whose application such order shall have been made or such inquiries undertaken: provided always, that no exchange shall be made of any land held in right of any church or chapel or other ecclesiastical benefice, without the consent, testified in writing, of the bishop of the diocese and the patron of such benefice.

Division of intermixed Lands, not subject to be enclosed.

CXLVIII. And be it enacted, that it shall Division of intermixed lands. be lawful for the commissioners, upon the application in writing of any number of persons who shall be separately interested in parcels of land not subject to be enclosed under this Act or of land subject to be enclosed under this Act as to which no proceedings for an enclosure shall be pending, so intermixed or divided into parcels of inconvenient form or quantity that the same cannot be cultivated or occupied to the best advantage, but forming together a tract which may be divided into convenient parcels, and who shall desire to have the whole of such tract divided into convenient parcels, to be allotted in lieu of the old parcels, to direct an inquiry whether such proposed division and allotment would be beneficial to the owners of such lands; and in case the commissioners shall be of opinion that the proposed division and allotment would be beneficial, they shall, unless notice of dissent from the proposed division and allotment shall be given, under the provisions herein-after contained, cause to be framed an order for the division or allotment thereof accordingly, with a map or plan thereunto annexed, in which shall be specified, as well the parcels which the several persons on whose application such order shall have been made were

respectively interested in before such division and allotment, as the several parcels allotted to them respectively by such order, and such order shall be confirmed under the hands and seal of the commissioners; and a copy of such order, sealed with the seal of the commissioners, shall be delivered to each of the parties on whose application the division and allotment shall have been made; and such order of division shall be good in the law to all intents and purposes whatsoever, and shall in nowise be liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the parcels of land taken by the persons interested under such division shall be and enure to, for, and upon the same uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the several lands which the persons taking the same shall have relinquished or lost on such division would have stood limited to, for, or upon, or been subject to, in case such order had not been made; and all expenses with reference to any such order, division, and allotment, or the inquiries in relation thereto, or to any proposed division or allotment, shall be borne by the persons on whose application such order shall have been made or such inquiries undertaken,

Exchange of Allotments for Poor and for Public Purposes.

CXLIX. And be it enacted, that where, Inconvenient allotments for the poor and public purposes may be exchanged for land more convenient. under the powers of any enclosure act, any allotment shall have been made in trust for the poor inhabitants of any parish, or of any class of such poor inhabitants, or in trust to be leased, used, or enjoyed to or by or upon any other trusts for the benefit of such poor inhabitants, or for the purposes of exercise and recreation, or for any other public or parochial purpose, and it shall appear to the commissioners that such allotment, by reason of its distance from the dwellings of such poor inhabitants, or from the nature or quality of the soil, or otherwise, shall not be convenient or suitable for the purposes for which the same shall have been made, it shall be lawful for the commissioners, upon the application in writing of the churchwardens and overseers of the poor of the parish in which such allotment shall be situate, or of the trustees for the time being of such allotment, and of the person interested in land more convenient or suitable for the purposes for which such allotment shall have been made, and who may be willing to give such land in exchange for such allotment, in case the commissioners shall be of opinion that such exchange would be beneficial to the poor inhabitants or other persons for whose benefit or more suitable to the

purposes for which such allotment was made, to cause to be framed and to confirm an order of exchange of such allotment for such other land as aforesaid; and the provisions herein contained concerning exchanges shall apply to such allotment as if such churchwardens and overseers or trustees respectively were the persons interested in such allotment.

Notice of Exchanges.

Notices of such exchanges and divisions to be given.

CL. Provided always, and be it enacted, that no such order of exchange or order of division and allotment as aforesaid shall be confirmed by the commissioners until notice shall have been given by advertisement in three successive weeks of such proposed exchange or division and allotment, and three calendar months shall have elapsed from the publication of the last of such advertisements; and in case before the expiration of such three calendar months any person entitled to any estate in or to any charge upon any land included in such proposed exchange or division and allotment shall give notice in writing to the commissioners of his dissent from such proposed exchange or division and allotment, as the case may be, the commissioners shall not confirm an order for such exchange or such division or allotment, unless such dissent shall be withdrawn, or it shall be shown to the commissioners that the estate or charge of the party so dissenting shall have ceased.

Expense of Exchanges.

CLI. And be it enacted, that if any difference shall arise touching the said expenses in relation to any exchange, division, allotment, orders, or inquiries as aforesaid, or the share thereof to be paid by any person, it shall be lawful for the commissioners to certify under their hands and seal the amount to be paid by such person; and in case any person shall neglect or refuse to pay his share so certified to be payable by him, and upon the production of such certificate before any two justices of the peace for the county or other jurisdiction wherein the land shall be situate, such justices, upon the nonpayment thereof, are hereby required, by warrant under their hands and seals, to cause the same to be levied by distress.

Expenses of exchanges and divisions.

*Remedy of defective Proceedings under the Common Fields Act.**

CLII. And be it enacted, that where any award already made and executed, or hereafter to be made and executed, in pursuance of any

Commissioners may remedy defects and omissions of awards under local acts of enclosure, or under 6 & 7 W. 4. c.

* Under colour of the provisions of the 6 & 7 W. 4. c. 115. a large quantity of land has been enclosed, which was not within the scope of that act, viz. wastes upon which no severalty rights attached. The holders of these allotments have therefore no legal title. They may either seek one from the commissioners under the Act before us, or trust to efflux of time.

local act of inclosure*, or in pursuance of an act passed in the seventh year of the reign of

* This provision enables the commissioners to remedy, among other defects in awards, one which has been very severely felt. "There is a clause in most enclosure acts," writes Mr. Coventry, in his work on Titles derived through Enclosure Acts, "communicating the title of the old enclosures to the lands allotted. This inconvenience then arises : if a proprietor have lands derived through five different titles, some copyhold, some leasehold, and some freehold, and five separate allotments are made to him, every part of all the allotments will be subject to the whole of these titles ; that is, a purchaser cannot be advised to complete his contract for the purchase of all or any one of the allotments, without satisfying himself as to the soundness of all the five titles ; for if one title be defective, and an eviction ensue, he cannot ascertain the particular allotment or part of allotment which will be recovered ; and no prudent purchaser could be advised to pay his money for land surrounded with such uncertainty of possession."

Mr. Preston, in his learned works on Abstracts of Title, observes upon this subject, "In one instance it was reasonably computed that there must have been two hundred different abstracts to show the real state of the title ; and in another a vendor abated twenty thousand, out of sixty thousand pounds, rather than have the contract rescinded on account of an objection, insisting on this defect, that since the lands were not ascertainable, the court could not decree performance with an abatement."

"This evil is so general and alarming, and productive of so much inconvenience and expense," says Mr. Coventry, "as in the writer's opinion to call for immediate legislative interference, empowering the old commissioners, or new ones to be duly appointed, to appropriate such general allotments according to the respective titles of the proprietor. Indeed, without an act of parliament for the purpose, it is difficult to discover any sure mode of division."

Such were the opinions of eminent conveyancers as to

his late majesty king *William* the Fourth, intituled "An Act for facilitating the Enclosure of open and Arable Fields in England and Wales," shall not have duly distinguished the several tenures of all the lands thereby awarded or allotted, or of any other lands of which the tenure ought to have been distinguished in or by such award, or the different estates or titles for or under which any lands therein mentioned should be held, or shall not have duly distinguished the lands which after such award should remain subject to all or any tithes, and the lands which should be discharged from all or any tithes, or where by any such award an aggregate allotment shall have been set out and awarded in any case in which several and distinct allotments ought to have been set out and awarded, in every such case, and in every other case in which it shall appear to the commissioners that inconvenience shall have arisen

the magnitude of the evils which this clause was framed to remedy.

Perhaps, however, it should be remarked, that allotments made in lieu of rights of common attached to old enclosures of copyhold or customary tenure, do not follow the customary tenure of the old enclosure, but are freehold. *Revell v. Jodrell*, 2 T. R. 424. The usual clause in enclosure acts, that the allotments shall be held for the same estates, and subject to the same limitations as the old enclosures, or the clause saving the lord's rights, do not operate to render the allotments copyhold. *Doe v. Davidson*, 2 M. & S. 175. Some acts, however, contain a special clause, creating a copyhold tenure in the allotments.

from inaccuracy, confusion, or omission in any such award, it shall be lawful for the commissioners, upon the application in writing of any person interested in the lands to which such award may relate, or of any person prejudiced by the inaccuracy, confusion, or omission in such award, to make such inquiries and take such evidence, by themselves or by an assistant commissioner, as they shall think fit, and by an order under their hands and seal to amend such award, and to distinguish the several tenures of the lands thereby allotted and awarded, and the different estates or titles for or under which the same should be held, and to distinguish the lands which should be discharged from all or any tithes, and the lands which should remain subject to all or any tithes, and to subdivide aggregate allotments into separate allotments, and to distinguish the tenures or titles thereof, or the lands or rights in respect of which they were respectively made, and generally to make or give such declarations or directions as may appear necessary to supply any omission and rectify any inaccuracy or confusion in such award; and such order of the commissioners shall have the same force and effect as if the allotments, directions, and declarations therein contained had been duly made and contained in the original award, in addition, or, as the case may require, in substitution for the parts thereof to which such amendments may relate;

and all expenses with reference to such order as last aforesaid, and of and consequent upon all inquiries in relation thereto, or to any proposed amendment of any such award, shall be borne by the persons on whose application such order shall be made or such inquiries undertaken.

*Remedy of defective proceedings under Local Enclosure Acts.**

CLIII. And be it enacted, that where under any local act of enclosure the powers and

Commissioners may revive powers under local enclosure acts lost by lapse of time, or otherwise.

* In the first imprint of this bill, these words stood "shall have been lost or supposed to have been lost." The omission of the latter member of the sentence lets in the doubtful question as to when the powers of a commissioner under a local enclosure act are actually determined by the expiration of the time within which the publication of the award is directed by the act.

In *Haggerstone v. Dugmore*, 1 B. & Ald. 82., an enclosure commissioner was held to have the power of levying rates for expenses four years after his award had been published, *Holroyd*, J. saying that "the power of the commissioners must, from the reason of the thing, continue till they have fully executed the duty imposed upon them by the act." It does not, however, appear from the report of this case whether any time was limited by this particular act; the argument insisted upon by counsel being, that the office of the commissioner ceased on the publication of his award.

In the case of arbitrators, it is certain that their authority determines upon the expiration of the time limited. See the cases collected in *Watson on Arbitrations*, p. 106.; but I am not aware of any decisions exactly in point on the subject of enclosure commissioners.

authorities originally vested in the commissioner or commissioners acting under any such local act, or any such power or authority, shall not have been fully executed according to the intent of such local act, and shall have been lost or become incapable of being executed by reason of the neglect or omission to execute the same, or to take some proceeding necessary to the due execution thereof within the time limited in that behalf by such local act, or from any other cause whatsoever, it shall be lawful for the enclosure commissioners for England and Wales, by any order under their hands and seal, to authorize the commissioner or commissioners appointed by or acting under the authority of such local act to execute and to carry into effect the powers and authorities originally vested in such last-mentioned commissioner or commissioners, or in any previous commissioner or commissioners under such local act, in the same manner as if such powers and authorities had not been lost or become incapable of being executed, or as near thereto as lapse of time and other circumstances may permit, and subject to such conditions and restrictions as the justice of the case may appear to require, and in and by such order to direct any act or proceeding to be done or taken in substitution for any act or proceeding which shall have been required or directed by such local act, and which shall have become incapable of being done or taken

by lapse of time or other circumstances ; and all proceedings, adjudications, orders, directions, and acts taken, made, and done by the commissioner or commissioners under any local act, in pursuance of any such order as aforesaid of the inclosure commissioners for England and Wales, shall have the same force and effect as if the same had been duly authorized by such local act ; and the expenses of such order, and of the inquiries in relation thereto, shall be paid by the commissioner or commissioners acting under such local act, and shall be deemed expenses under the enclosure by such local act authorized.

CLIV.* And be it enacted, that where the powers and authorities of any local act of enclosure shall not have been fully executed and performed, whether the same shall or shall not have been lost or have become incapable of being executed from lapse of time or otherwise, and there shall be no commissioner acting under such local enclosure act, or in case from any other cause any of the persons interested in the

Commissioners may appoint persons to complete proceedings in an imperfect enclosure.

* This section provides a very wholesome check upon the hitherto irresponsible powers of an enclosure commissioner. The effect is to enable the enclosure commissioners to discharge the commissioner named in any local act, and to appoint another, upon request of the major part in value of the persons interested in the commons. This section may hasten the completion of many long delayed awards.

land to which such local act shall relate shall be desirous that the powers and authorities of such act should be executed, and the proceedings thereunder completed under the direction of the enclosure commissioners for England and Wales, it shall be lawful for the said commissioners, by order under their hands and seal, upon the application in writing of the major part in value of the persons interested in the lands subject to be enclosed under such local act, to appoint any person to execute the powers or authorities of such local act, in the place of the commissioner or commissioners by such act appointed or authorized to be appointed, and to complete the proceedings under the same; and it shall be lawful for the said enclosure commissioners for England and Wales by such order as aforesaid, or by any supplemental or other order, to authorize the person so appointed to execute and to carry into effect any powers or authorities originally vested in any commissioner or commissioners under such local act, and which may have been lost or become incapable of being executed, and to give such other directions in relation thereto as under the provision herein-before contained might have been given to the commissioner or commissioners appointed by or acting under a local act; and the, person so appointed by the commissioners shall and may complete the proceedings under such local act, and make an award

therein, and shall have such and the like powers and authorities in all respects as the commissioner or commissioners originally appointed by or acting under such local act would have had if he or they had continued to act; and it shall be lawful for the enclosure commissioners for England and Wales, by order under their hands and seal, to remove any person so appointed, and upon such removal, or in case any person so appointed shall die, or desire to be discharged from his office, before the proceedings in such enclosure shall be completed, from time to time to appoint any other person in his stead, with all such powers and authorities as aforesaid; and the expenses of such orders of the commissioners, and of all proceedings in relation thereto, shall be expenses in the enclosure, and raised in the same manner as other expenses may by such local act be authorized to be raised.

CLV. Provided always, and be it enacted, that the commissioners shall not in any case proceed to amend any award under any local act of enclosure, or under the said act of the seventh year of the reign of king William the Fourth, or to authorize the execution of any power or authority under any such local Act which shall have been lost or become incapable of being executed as aforesaid, or to authorize any person to be by them appointed as aforesaid to execute the powers or authorities of any

Commissioners to give notice before proceeding to amend awards under local act.

local act in the place of the commissioner or commissioners appointed under such local act until notice of the application to the commissioners to amend such award, or to authorize the execution of such powers or authorities, or to authorize any person to be by them appointed as aforesaid, shall have been given by advertisement in four successive weeks; and in case within two calendar months after the publication of the last of such advertisements one fourth part in number or value of the persons interested, according to the definitions hereinbefore contained, in the land to which the award so proposed to be amended, or the part thereof proposed to be amended, shall relate, or in the land to be affected by the exercise of such powers or authorities, shall give notice in writing to the commissioners of their dissent from such application, the commissioners shall not proceed further on such application.

Proviso for cases where dealings have been had with land on faith of inaccuracies, &c. proposed to be rectified.

CLVI. Provided also, that in every case in which dealings shall have been had with such land, or some part thereof, on the faith of the inaccuracy, confusion, or omission which it shall be proposed to rectify or supply, or on the faith of such powers or authorities having been lost or become incapable of being executed, or on the faith of the powers or authorities of such local act not being executed under the powers of such local act, or the actual possession of the

land, or the receipt of the rents and profits of the land, to which the award so proposed to be amended, or the part thereof proposed to be amended, shall relate, or, as the case may be, the possession of the land, or the receipt of the rents and profits of the land, to be affected by the exercise of such powers or authorities, would be altered by the proposed amendment of the award, or by the exercise of such powers or authorities as aforesaid, the commissioners shall not proceed on such application, so far as respects the land with which such dealings may have been had, or of which the possession or the receipt of rents and profits would be altered as aforesaid, without the consent of the persons interested in such last-mentioned land, nor shall the commissioners proceed in any case upon such application, so far as respects such last-mentioned land, in case within two calendar months after the publication of the last of such advertisements as aforesaid any person entitled to any estate in or to any charge upon such last-mentioned land shall give notice in writing to the commissioners of his dissent from such application.

*Confirmation of Awards under Common Fields
Act.*

CLVII. And be it enacted, that where by any award or agreement expressed to be made

Commis-
sioners may
confirm
awards or

agreements
made under
supposed
authority of
6 & 7 W. 4.
c. 115.

under the authority of the said act of the seventh year of king William the Fourth, intituled "An Act for facilitating the Enclosure of Open and Arable Fields in England and Wales,"* any moors, commons, or waste lands, or other lands not subject to be enclosed under the provisions of such last-mentioned act, shall have been enclosed or apportioned and allotted, and the lands so enclosed or apportioned and allotted shall be within the definition of lands subject to be enclosed under this Act, it shall be lawful for the commissioners, upon the application of any person interested in any land so enclosed or apportioned and allotted, to make such inquiries in relation to such award or agreement as the commissioners shall think fit; and if it shall appear to the commissioners that the rights and interests of all parties interested in the lands expressed to be enclosed or apportioned and allotted by such award or agreement shall have been duly provided for and compensated thereby,

* There is no power under this act to confirm agreements made among the commoners for the enclosure of wastes. The instances are not rare throughout the country in which commons have been thus enclosed, and the enclosers trust to a future efflux of time to make them a title. It would surely have been well if this act had conferred a power upon the commissioners to confirm such agreements (after due inquiry), just as the tithe commissioners have power to confirm invalid compositions real. At present such parties must go through the usual forms, call upon the commissioners to enclose and obtain the provisional order, sanction of parliament, and award, before they can gain a marketable title.

or might be duly provided for and compensated thereby if such award or agreement were confirmed, or amended and confirmed, as hereinafter mentioned, it shall be lawful for the commissioners, by any order under their hands and seal, to confirm such award or agreement, or to amend the same, as the justice of the case and the rights and interests of the parties may appear to the commissioners to require, and to confirm the same, with the amendments specified in such order, as the commissioners shall think fit; and every award and agreement so confirmed shall, with the amendments, if any, which shall have been made by such order, have the same force and effect as a final award under the authority of this Act; and all expenses with reference to such order as last aforesaid, and of all inquiries in relation thereto, or to any proposed confirmation of any such award or agreement, shall be borne by the persons interested in the lands by such award or agreement enclosed or apportioned and allotted, in such proportions as the commissioners shall direct: provided always, that the commissioners shall not confirm any such award or agreement, or proceed to make any inquiries in relation thereto, unless it shall be made to appear to the commissioners that the persons making the application for a confirmation of such award or agreement represent at least one third in value of the interests in such lands.

Trustees under Local Acts.

Power to reduce the number of trustees under local act where a sufficient number of persons qualified cannot be found.

CLVIII. And be it enacted, that where, under any local act of enclosure, or under any award made under the authority of any local act of enclosure, provision shall have been made for the election, from among persons having certain qualifications in respect of property or otherwise, of a number of trustees or other functionaries for making or maintaining works on the lands enclosed, or for any other local functions, and it shall appear to the commissioners that by reason of alterations in the state of property or otherwise persons cannot be found according to the qualifications required by such local act of enclosure to fill up the number of trustees or other functionaries required by such local act, it shall be lawful for the commissioners, after such inquiries as they shall think fit, upon the request and at the expense of any persons interested in the works to be made or maintained, or in the functions to be performed by such trustees or functionaries, by order under the seal of the commissioners to declare that any such lesser number, in such order to be mentioned, of trustees or other functionaries, may be from time to time elected for the purposes or be competent to exercise and perform the powers and functions in such local act of enclosure required or authorized to be exercised by the number of trustees

or other functionaries directed to be elected by such local act, and such lesser number shall be from time to time elected, and shall be competent to exercise and perform such powers and functions accordingly.

CLIX. And be it enacted, that all penalties and forfeitures imposed by this Act, or which shall be imposed by the commissioners or assistant commissioner acting in the matter of any enclosure or other proceeding under or by virtue of the authority of this Act, shall be levied and recovered before any two justices of the peace for the county in which the land subject to be enclosed, or to which such other proceeding shall relate, shall be situate, and not interested in the matter in question, for which purpose it shall be lawful for any such justices of the peace, upon complaint made to them, to summon the party accused and the witnesses on both sides, and upon the appearance or contempt of the party accused to examine such witnesses upon oath (which oath such justices are hereby empowered to administer), and upon such evidence to give judgment accordingly, and to condemn the party accused (proof of the accusation being made by one or more witness or witnesses as aforesaid) in such penalties and forfeitures as the offender shall have incurred, and to levy such penalties and forfeitures by distress, together with reasonable costs; all which penal-

Penalties and
forfeitures
how recover-
able.

ties and forfeitures the application whereof is not particularly directed by this Act shall, and so soon as the same shall be levied, be paid and applied to and for such uses, intents, or purposes as the commissioners in and by any writing under their hands and seal shall order, direct, or appoint.

Distress.

Distress, how
to be made.

CLX. And be it enacted, that when in this Act any sum of money, whether in the nature of penalty or otherwise, shall be directed to be levied by distress, such sum of money shall be levied by distress and sale of the goods and chattels of the party liable to pay the same; and the surplus monies arising from such sale, after satisfying such sum of money, and the costs and expenses attending the distress and sale shall, on demand, be rendered to the party whose goods and chattels shall have been distrained.

Distress not
unlawful for
informality.

CLXI. And be it enacted, that no distress levied by virtue of this Act shall be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the warrant of distress or other proceeding relating thereto, nor shall such party be deemed a trespasser *ab initio* on account of any irregularity afterwards

committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action upon the case.

General Provision as to Notices.

CLXII. And be it enacted, that all notices Notices, how to be given. by this Act directed to be given by advertisement shall be given by an advertisement to be inserted in some newspaper or newspapers printed or usually circulated in the county in which the land subject to be enclosed, or other land to which such notice shall relate, shall be situate; and all notices directed to be given on the church door shall be by writing under the hand of the party giving such notice, to be affixed on the principal outer door of the church of every parish and ecclesiastical district in which the land subject to be enclosed, or other land to which such notice shall relate, or any part thereof, shall be situate, on Sunday before divine service, or where in any such parish or ecclesiastical district there shall be no church, then to be affixed in some conspicuous place of such parish or ecclesiastical district on Sunday before ten of the clock in the forenoon; and all notices necessary to be given by the commissioners or any assistant commissioner or valuer acting in the matter of any enclosure (the mode of giving which is not hereby parti-

cularly directed) shall be by either or both of the methods aforesaid, as the commissioners or assistant commissioner or valuer respectively shall think fit; and all notices so given shall be deemed sufficient notices to all persons concerning all matters and things to which such respective notices shall relate.

Advertisements.

Advertisements,
awards, &c.
free of duty.

CLXIII. And be it enacted, that no advertisement inserted by direction of the commissioners or any assistant commissioner acting in the matter of any enclosure in the *London Gazette* or in any newspaper for the purpose of carrying into effect any provision of this Act, and no agreement, award, bond, or power of attorney made or confirmed or used under this Act, shall be chargeable with any stamp duty.

Punishment of Witnesses misbehaving.

Persons giving false
evidence, &c.
to be guilty
of a misdemeanor.

CLXIV. And be it enacted, that if any person under the provisions of this Act shall wilfully give false evidence, or shall make or subscribe a false declaration for the purposes of this Act, or shall wilfully refuse to attend in obedience to any lawful summons of the commissioners or an assistant commissioner or valuer, or to give evidence, or shall wilfully alter, withhold, destroy, or refuse to produce any

book, court roll, or writing, map, plan, or survey, or any copy of the same, which may be lawfully required to be produced before the commissioners or assistant commissioner or valuer, he shall be deemed guilty of a misdemeanour.

Limitation of Actions.

CLXV. And be it enacted, that no action or <sup>Limitation of
Actions.</sup> suit shall be commenced against any commissioners, assistant commissioner, justice of the peace, valuer, or other person, for any thing done under the authority of this Act, until two calendar months' notice thereof shall have been given in writing to the party against whom such action or suit is intended to be brought, or after sufficient satisfaction or tender of amends shall have been made to any party aggrieved, or after twelve calendar months shall have expired from the commission of the act for which such action or suit shall be so brought, or in case there shall be a continuance of damages then within twelve calendar months next after the doing or committing of such damage shall have ceased; and every such action shall be brought, laid, and tried in the county or place where the cause of action shall have arisen, and not in any other county or place; and if it shall appear that such notice of action or suit was brought before two calen-

dar months' notice thereof given as aforesaid, or that sufficient amends were made or tendered as aforesaid, or if any such action or suit shall not be commenced within the time before limited in that behalf, or such action shall be laid in any county or place other than as aforesaid, then the jury shall find a verdict for the defendant therein, or the court, upon summary application by motion in any such suit, may dismiss the same against such defendant; and if a verdict shall be found for such defendant, or such suit shall be dismissed upon application as aforesaid, or if the plaintiff in such action or suit shall become nonsuit, or suffer a discontinuance of such action, or if upon any demurrer in such action or suit judgment shall be given for the defendant therein, then such defendant shall have costs, charges, and expenses as between attorney and client.

Certiorari.

Proceedings
not to be re-
moved by
certiorari.

CLXVI. And be it enacted, that no order, adjudication, or proceeding made or had by or before the commissioners or any assistant commissioner under the authority of this Act, except as herein-before provided, or any proceeding to be had touching any offender against this Act, shall be quashed for want of form or be removed or removeable by certiorari or any

writ or process into any of her Majesty's courts of record at Westminster, or elsewhere.

Interpretation Clause.

CLXVII. And be it enacted, that in the <sup>Interpreta-
tion clause.</sup> construction and for the purposes of this Act, unless there be something in the subject or context repugnant to such construction, the word "person" shall mean and include the Queen's Majesty, and any body corporate, aggregate or sole, as well as an individual; any word importing the singular number only shall mean and include several persons or parties as well as one person or party, and several things as well as one thing respectively, and the converse; any word importing the masculine gender only shall mean and include a female as well as a male; the word "enclosure" shall extend to and include division or allotment; the word "enclose" and its conjugates shall include the meaning also of the words "divide" and "allot" and their respective conjugates; and the words "local act of enclosure" shall extend to and include any local act of which enclosure, division, or allotment of lands shall have been one of the objects or purposes; the word "manor" shall extend to and include any hundred, honour, or lordship; the word "land" shall mean and include all messuages, lands, and corporeal tenements and hereditaments; the

word "county" shall include any riding or other like division of a county, and any liberty, city, or place having a separate commission of the peace; the word "parish" shall include any township or vill or hamlet having separate overseers of the poor, or extra-parochial district or place; the word "church" shall mean and include any chapel where there is no church; the word "schoolhouse" shall mean any parochial or charitable schoolhouse; the words "the commissioners" shall mean the enclosure commissioners for England and Wales; and the words "assistant commissioner" shall mean the assistant commissioner appointed by the enclosure commissioners.

Act to extend
only to Eng-
land and
Wales.

CLXVIII. And be it enacted, that this Act shall extend only to England and Wales.

Alteration of
Act.

CLXIX. And be it enacted, that this Act may be amended or repealed by any act to be passed in this present session.

Form of Conveyance by Commissioners.

Form of Summons.

to wit. } I esquire, one
of Her Majesty's justices of the
peace in and for the said county of

word "county" shall include any
 like division of a county, and
 or place having a separate
 peace; the word "parish"
 township or vill or hamlet
 seers of the poor, or
 place; the word "church"
 clude any chapel, or
 word "schoolhouse"
 or charitable institution
 missioners"
 sioners for
 "assistant"
 ant cor
 commi

the
 the
 ame
 [he
 diminu-
 ne regulated
 at the said A. B.
 sive payment for in-
 pasture in the regulated
], otherwise the com-
 proceeded with as if you had
 Given under my hand and seal,
 day of
 in the

Act to extend
 only to Eng-
 land and
 Wales.

s)

Form of Order.

Alteration
 Act.

} The order of
 to wit. } esquires, two
 of Her Majesty's justices of the peace in
 and for the said county, made at
 in the said county of
 the day of
 in the year

WHEREAS complaint hath been made to us
 by A. B. for that he [state the
 complaint as in the summons]; we do declare
 that [the yearly sum of is a

FOR ENCLOSURE OF WASTES.

287

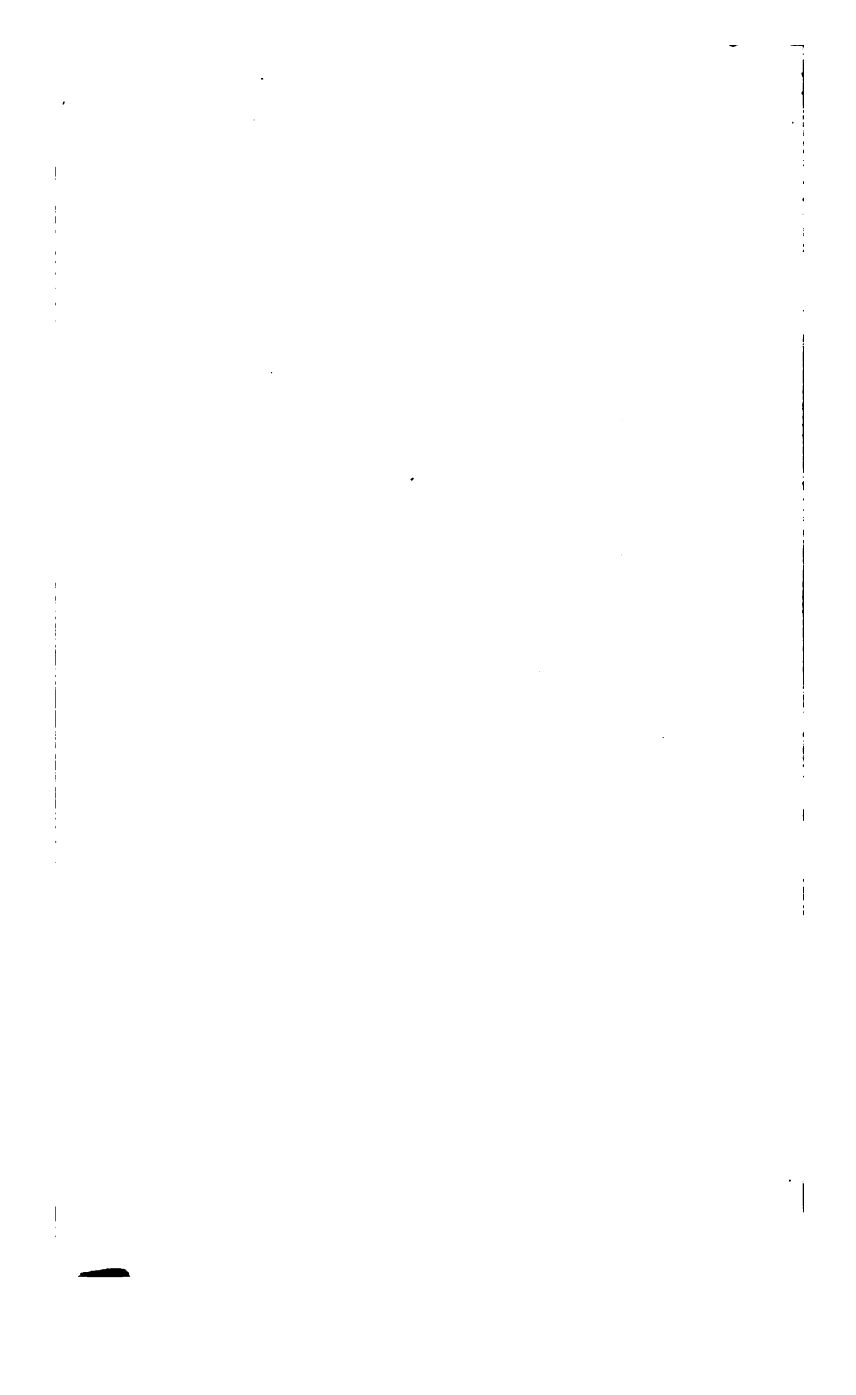
compensation for the diminution of
of the said *A. B.*] or [the
is a reasonable
the right of pasture of
under that such yearly
directions of the
under our hands
y of

285

ENCLOSURE OF WASTES

with this Act refer

signatures



APPENDIX.

ANNO SECUNDO ET TERTIO GULIELMI IV. REGIS.

CAP. LXXI.

An Act for shortening the Time of Prescription
in certain Cases. [1st. *August*, 1832.]

WHEREAS the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice ; for remedy thereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land

Claims to
right of
common and
other profits
à prendre, not
to be defeated
after thirty
years' enjoy-
ment by

showing the
commence-
ment;

being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

after sixty
years' enjoy-
ment the
right to be
absolute,
unless had by
consent or
agreement.

In claims of
right of way
or other
easement the
periods to be
twenty years
and forty
years.

II. And be it further enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person

claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

III. And be it further enacted, that when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Claim to the use of light enjoyed for 20 years indefeasible, unless shown to have been by consent.

IV. And be it further enacted, that each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless

Before-mentioned periods to be deemed those next before suits for claims to which such periods relate.

the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.

In actions on the case the claimant may allege his right generally, as at present.

V. And be it further enacted, that in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter herein-before mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this Act may be alleged; and exceptions or other matters to be replied specially.

on any general traverse or denial of such allegation.

VI. And be it further enacted, that in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim.

Restricting the presumption to be allowed in support of claims herein provided for.

VII. Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein-before mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

Proviso for infants, &c.

VIII. Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other convenient water-course or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be ex-

What time to be excluded in computing the term of forty years appointed by this Act.

cluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

Not to extend to Scotland or Ireland.

IX. And be it further enacted, that this Act shall not extend to Scotland or Ireland.

Commencement of Act.

X. And be it further enacted, that this Act shall commence and take effect on the first day of Michaelmas term now next ensuing.

Act may be amended.

XI. And be it further enacted, that this Act may be amended, altered, or repealed during this present session of parliament.

FORMS.

THE following are the only Forms which have hitherto been sanctioned by the Commissioners :

FORM OF APPLICATION FOR INCLOSURE,

Indicating the particulars of the information to be furnished to the Inclosure Commissioners for England and Wales, by persons proposing to inclose land under the provisions of the Act of 8th and 9th Victoria, c. 118.

Parish or townships, or several parishes or townships, or extra-parochial place or places, as the case may be. If the land is in any district not here properly named, insert the proper description.
* Or counties.

The land to which the subjoined application relates, is situated in the _____ of _____ in the county * _____ of _____ and is commonly known as _____

1. What is the extent in statute acres of the land proposed to be inclosed ?

State in the answer to this question whether the acreable extent is given from the parish map or from any other survey, or by estimation.

2. Does the land lie together? or is it in more than one, and in how many separate tracts? If in separate tracts, what is the acreable extent of each?

3. Is the land proposed to be inclosed waste and uncultivated land? arable, meadow, pasture, or wood-land?

4. If of different kinds, what is the acreable extent of each?

5. What is the nature of the soil?

6. Are there any open mines, or any minerals, or valuable strata, now in course of being worked, or known to have been formerly worked, or known or supposed to exist in or under the land, and if so, what is the nature of these mines, minerals, or valuable strata, and the extent of the workings, if any, and is the property of these mines, minerals, and valuable strata separate from the ownership of the soil or otherwise, and are they worked by the owners or by lessees?

7. Is there any litigation, dispute, or question, as to the boundaries of the land proposed to be inclosed, or the mines, minerals, or strata in or under it; if so, between whom has it arisen?

8. Does the land proposed to be inclosed lie well together, so that it may be conveniently inclosed,

or is it intersected by, or does it surround any inclosures?

9. Does any town green or village green adjoin the land or any part of it; or is there any other town or village green in the parish or place within which the land proposed to be inclosed is situated?

10. Would any exchanges with owners of land not subject to be inclosed be desirable, for the purpose of straightening or improving the boundary in the event of an inclosure?

11. What is the number of the inhabitants of the parish, township, or place, or several parishes, townships, or places, in which the land proposed to be inclosed is situated, according to the last parliamentary census?

12. What is the occupation or what are the several chief occupations of the inhabitants, agricultural, manufacturing or otherwise, and what kinds of manufactures, if any, are chiefly carried on?

13. What is the city, town, or populous district, nearest to the land proposed to be inclosed, and what is the distance of such city, town, or populous district, from such land?

14. If there be more than one such city, town, or populous district, near such land, name them.

The number of inhabitants of cities

15. Is any part of the land proposed to be inclosed within fifteen miles of London; or within two

miles of any, and what, city or town of 10,000 inhabitants; or within $2\frac{1}{2}$ miles of any, and what, city or town of 20,000 inhabitants; or within three miles of any, and what, city or town of 30,000 inhabitants; or within $3\frac{1}{2}$ miles of any, and what, city or town of 70,000 inhabitants; or within four miles of any, and what, city or town of 100,000 inhabitants?

16. What is the number, so far as can be ascertained, of the parties interested as owners of the soil, common rights, or otherwise, in the land proposed to be inclosed? How many of the persons so interested have assented to this application?

17. What proportion does the value of the interest of the assenting parties bear to the whole value of the interests in the land proposed to be inclosed?

18. How many of the parties interested have dissented from the application, and what is the proportion of their interests to the whole value of the interests in the land?

19. How have the values of interests been ascertained; by the assessment to the poor rate, by number of stints, or how otherwise?

20. Is all, or any, and if any, what part of the land proposed to be inclosed, waste land of a manor, on which the tenants of such manor have rights of common? If so, the name of the manor and of the lord.

or towns is to be ascertained by the last parliamentary census, and the distance to be measured thus, viz.: Where there is a town hall, from the town hall of such city or town. Where there is no town hall, from the cathedral or church (if there be only one church), or if there be more than one church, from the principal market place of such city or town,—in a direct line.

If the land is in separate tracts, subject to separate and distinct rights, the parties interested in each tract, and the number and proportion in value of the assents and dissents of the parties interested in each tract, should be stated.

21. Is all, or any, and if any, what part of the land proposed to be inclosed, subject to rights of common which may be exercised at all times of the year for cattle levant and couchant upon other land, or to any rights of common which may be exercised at all times of every year, and which are not limited by numbers or stints ?

22. Is the land proposed to be inclosed, or any, and what part of it, subject to any, and what rights of common not mentioned in the two previous questions, or is all, or any, and what part of it, gated or stinted pasture, or what are the rights affecting such land, or the several tracts, if more than one, which are supposed to make it subject to be inclosed under the Act ?

23. What are the supposed advantages of the proposed inclosure, in the increased productiveness of the land, the useful employment of labour, or otherwise ?

24. Is it proposed that any, and if any, what allotment should be made for exercise and recreation ?

25. Is it proposed that any, and if any, what allotment should be made for the labouring poor ; and is the land, if any, proposed to be so allotted, convenient for the purposes of cultivation as gardens ?

26. If the lord of the manor is entitled to the soil, what allotment has been agreed or is proposed

to be made to him in respect of his right and interest, and is the allotment proposed to include a compensation for his interest in all or any of the mines, minerals, and sub-strata?

WE, the undersigned, being persons representing at least one-third in value of all the interests in the land above-mentioned, situated in the *

of in the county †
of proposing on behalf
of ourselves and

of the other persons interested to inclose such land, under the Act of 8th and 9th Victoria, c. 118., submit to the Inclosure Commissioners for England and Wales, the information in respect to such land and to the proposed inclosure written as Answers to the foregoing Questions, and we believe such information to be correct: And we hereby request the said Commissioners to sanction such inclosure, or to certify in their Annual General Report the expediency of such inclosure as the case may require.

* Parish or township, or place, or, several townships, parishes, or places [as the case may be]
† Or counties.

*To the Inclosure Commissioners
for England and Wales.
(Signed)*

FORM OF APPLICATION FOR EXCHANGE,

Under the 147th sect. of 8 & 9 Vict. c. 118.

*To the Inclosure Commissioners for England and
Wales.*

WE, the undersigned of
in the county of and

of _____ in the county of _____
 being the persons interested respectively under the
 provisions of the Act of the 8th & 9th Vict. c. 118.,
 in the lands herein-after mentioned,*

* And which
 are not subject
 to be inclosed
 under the
 said Act, or,
 which are
 subject to be
 inclosed un-
 der the said
 Act, and as to
 which no pro-
 ceedings for
 an inclosure
 are pending
 [as the case
 may be].

and being desirous of effecting an exchange as
 herein-after mentioned, Hereby apply to you to di-
 rect inquiries whether such proposed exchange would
 be beneficial to the owners of such respective lands ;
 and in case you should be of opinion that such ex-
 change would be beneficial, and the terms just and
 reasonable, to proceed with the same under the
 provisions of the said Act.

Lands in which the said _____
 is interested, situated in the Parish of _____
 in the County of _____ and pro-
 posed to be exchanged for the Lands herein-
 after specified :

Names of
 closes, num-
 ber of statute
 acres, estate
 in land, &c.
 nature of te-
 nure, nature
 of soil, and
 buildings if
 any.

Lands in which the said _____ is
 interested, situated in the Parish of _____
 in the County of _____ and
 proposed to be exchanged for the Lands herein-
 before set forth :

Names of
 closes, num-
 ber of statute
 acres, estate
 in land, na-
 ture of te-
 nure, nature
 of soil, and
 buildings if
 any.

Witness our hands, this _____ day of _____
 1845.

**FORM OF APPLICATION FOR DIVISION OF INTER-
MIXED LANDS,**

Under the 148th sect. of 8 & 9 Vict. c. 118.

WE, the undersigned, being separately interested, according to the provisions of the Act of the 8th and 9th Vict. c. 118., in the parcels of land set opposite our respective names in the schedule hereunder written *

and which are so †
into parcels of ‡
that the same cannot be §

to the best advantage,
but which form together a tract which may be divided into convenient parcels. And being desirous to have the whole of such tract divided into convenient parcels, to be allotted in lieu of the old parcels, — hereby apply to you to direct an inquiry, whether such proposed division and allotment would be beneficial to the owners of such lands, — and in case you shall be of opinion that the proposed division and allotment would be beneficial, to proceed with the same under the provisions of the said Act.

*which are not subject to be inclosed under the said Act, or, which are subject to be inclosed under the said Act, but as to which no proceedings for inclosure are pending [as the case may be].

† intermixed or divided, or, intermixed and divided [as the case may be].

‡ inconvenient form or inconvenient quality, or, inconvenient form and quality [as the case may be].

§ cultivated or occupied, or, cultivated and occupied [as the case may be].

SCHEDULE ABOVE REFERRED TO.

Name, Residence, and Description of Owner.	Names and Quantities of Parcels.	Parish in which situate.	Estate of in Land.	Nature of Tenure.	Nature of Soil and Buildings, if any.

Witness our hands this
day of

FORM OF APPLICATION,

Under the 121st sect. of the 8 & 9 Vict. c. 118.

* Here insert name of land proposed to inclosed.

† Insert name of parish or township, or, parishes or townships, or, extra-parochial place or places (as the case may be). If the land be in any district not here properly described, insert proper description.

‡ or counties.

§ Gated or stinted pasture (as the case may be).

|| Gates or stints (as the case may be).

¶ Number of such gates or stints.

WE the undersigned, representing two-thirds of the value of the whole interest in*

situate in the†

of

in the county ‡ of

The whole of the same

being already occupied as §

The number of such ||

being ¶

Hereby apply to the Inclosure Commissioners for England and Wales to take proceedings for the purpose of making such pasture subject to the provisions of the Act of the 8th and 9th Vict. c. 118., concerning regulated pastures, without its being subject to the other provisions concerning lands subject to be inclosed under the said Act.

Signatures of
Parties interested

{

NOTICE OF MEETING BY ASSISTANT INCLOSURE
COMMISSIONERS.

Inclosure.

WHEREAS an application for the inclosure of
in the
of in
the county of has been duly
made to "The Inclosure Commissioners for England

and Wales," pursuant to the provisions of the Act of the 8th and 9th Vict. c. 118.:

And whereas the said application has been referred by the said Commissioners to me, an Assistant Commissioner, duly appointed under the said Act:

I hereby give notice, that I shall hold a meeting on the day of
next, at the hour of in the
at in the
of for the purpose of hearing
any objections which may be made to the proposed inclosure, and any information or evidence which may be offered in relation thereto.

Witness my hand this day of

184

Assistant Inclosure Commissioner.

FORMS OF CLAIMS.

The Inclosure Commission has issued no forms for the claims to be given in to the valuer. They will be necessarily very various and must generally be specially drawn to meet the circumstances of the particular case. Three forms are submitted by the Editor, which will probably be found useful in cases of the most common occurrence.

CLAIM OF RIGHT OF COMMON OF PASTURE OVER
COMMON LANDS.

*To the Valuer acting in the matter of the Inclosure
of the Common of , in the Parish
of , and County of*

I, A. B., of in the county of
, being seised in my demesne
as of fee of a certain estate, called the Manor Farm,
situate in the parish of and con-
sisting of 160 acres of freehold land, do hereby claim
to be entitled for and in respect of the whole of the
said freehold estate, to common of pasture in, upon,
and throughout the said place called
for all my commonable cattle, levant and couchant
in and upon my said estate called the Manor Farm,
every year, at all times of the year, as to the said
freehold estate called the Manor Farm belonging
and appertaining.

CLAIM OF COMMON OF PASTURE OVER COMMONABLE
LANDS.

*To the Valuer acting in the matter of the Inclosure
and Division of certain Common Fields in the
Parish of and County of*

I, A. B. being seised in demesne as of fee of a
certain messuage, and acres of land, with the
appurtenances, lying in the parish of
in the county of , do claim
as follows:—Whereas there now are, and from

time whereof the memory of man is not the contrary,
there have been lying and being in the said parish,
of _____, in the county of _____

_____, three common fields, that is to
say, one common field called the Home Field, one
other common called the Lower Field, and one other
common field called the Upper Field, and which
said three several common fields have, from all the
said time immemorial, been used and accustomed to
be, and ought to be tilled and cultivated, in every
year in rotation, and successively, one of the said
three fields hath been, and of right ought to be sown
with wheat, or other corn or grain, and in and
during that year hath been usually known and dis-
tinguished by the name of the Wheat Field; and
another of the said common fields hath in such year
been usually known and distinguished by the name
of the Barley Field; and the other of the said com-
mon fields hath in such year lain and ought to be
known and distinguished by the name of the Fallow
Field, or Summer-tilled Field, so that by such ro-
tation, each and every of the said three fields has
been and ought to be, one year sown with wheat,
or other corn or grain, another year sown with bar-
ley, or other corn or grain, and the third year hath
lain, and ought to be fallow and summer-tilled in ro-
tation: Now I, the said A.B., do claim that by reason
of being so possessed of my messuage and lands,
with the appurtenances, to have common of pasture
yearly and every year in and throughout such of
the said common fields as by and according to the
said rotation hath lain, or ought to be fallow and be

RIGHTS OF COMMON.

summer-tilled, my own land in that field only excepted, for fifty sheep, levant and couchant in and upon my said messuage and lands, with the appurtenances, in every such year.

CLAIM OF COMMON OF PASTURE,

Under the 2 & 3 Will. IV. c. 71.

To the Valuer acting in the matter of the Inclosure of the Common of _____ *in the Parish of* _____ *, and County of* _____.

I, A. B., of _____ in the county of _____ being seised in my demesne as of fee of a certain estate called the Manor Farm, situate in the parish of _____ in the county of _____ and consisting of one hundred acres of freehold land, do hereby claim to be entitled for and in respect of the whole of the said freehold estate, to common of pasture in, upon, and throughout the said place, called the _____ common, for all my commonable beasts, levant and couchant, in and upon my said estate called the Manor Farm, every year, and at all times of the year, as to the said freehold estate called the Manor Farm belonging and appertaining; and I do claim the said right of common by reason of such right having been actually taken and enjoyed by myself and by those whose estate I hold, claiming right thereto, without interruption, for the full period of thirty years [or, for the full period of sixty years, as the case may be], according to the

provisions of an Act made and passed in a session of parliament held in the second and third years of the reign of his late Majesty King William the Fourth, intituled "An Act for shortening the Time of Prescription in certain cases."



INDEX.

Act of Parliament. See Local Act.

Enclosure by, 69.

Common Fields' Act, 70.

New General Enclosure Act, 89.

Sessional General Enclosure Act, 72. 131.

Action

on feigned issue, 161.

not to abate, 163.

Admeasurement of Common, 19.

Admiralty

consent if required for making Embankments, 105.

Advertisements

to be free of duty, 280.

Agrarian Law

origin of Rights of Common, traced to, 1.

Agreement

Enclosure by. See Enclosure.

as to expences of Valuer. See Valuer.

made under supposed authority of Common Fields' Enclosure Act, 273.

Alienation

of Rights of Common, 45.

Allotments. See Gardens.

for labouring Poor, Exercise and Recreation, 121, 122. 123.
182 and 183.

management of, 217.

where omitted, Report to state Reasons, 129, 130.

for repair of Roads, 177.

Allotments — continued.

- for public Purposes, 179.
- to Lord, 186.
- Fencing, if, 191.
- to Classes of Persons, 194.
- Power of Sale of, 196.
- to Joint Tenants, Coparceners, or Tenants in common, may be made in severalty, 198.
- Tenure of, 202.
- Valuer may empower Allottees to enter upon, 203.
- Alteration of, 210.
- to be in Compensation of previous Rights, 215.
- may be subdivided by supplemental Order, 216.
- Exchange of, 198.
 - for poor or public Purposes, 261.
- Mortgage of, 244.
- Sale of, 246.
 - of parts of, 267.

Allotment Wardens.

- Appointment and duties of, 217.

Ancient Tenement.

- Turbary may be appended or Appurtenances, to, 31.
- what is, 86.

Appeal

- against Boundary decisions, 145.
- against Valuer's decision, 159.
- against Commissioner's decision, 161.
- against stoppage of public Road, 169.

Application for Enclosure

- how to be made, 119.
- form of, 294.
- by Owners of separate Tracts, 126.
- Expences attendant upon, 120.

*Approval, 52. 68.**Arable Land,*

- Common appendant, originally limited to, 13.

Arbitration

- differences may be submitted to, 165.

Assessor

may be specially appointed to decide contested Claims, 136.

Assistant Enclosure Commissioner

to be appointed by Commissioners, 94.

Salaries of, 95.

to make Declaration, 97.

may summon Witnesses, 98.

to hold preliminary Meeting, 119.

to report upon Applications, 121.

may be specially appointed Assessor, 136.

sketch of proceedings of, under an Application to Enclose, 71.

Attorneys

appointment of, 114.

Form of Power of, 115.

Award.

Valuer to draw up, 213.

Confirmation of by Commissioners, 214.

of regulated Pasture,

Valuer to draw up, 234.

Commissioners to confirm, 234.

Custody of, 255.

B.

Bishop

consent of to Exchange of Allotment, 200.

Boundaries

Power in Commissioners to set out, 140.

Appeal against Determinations of Commissioners, 141.

Power to straighten, 148.

Bracton

treats of rights of Common, 5.

Burgagers

may have Common Appurtenant, 18.

may prescribe for themselves and Inhabitants, 35.

two thirds must consent to Enclosure, 126.

Allotment for, 195.

C.

Cart Bote, 7. 28.

Cattle

Commonable Cattle, 12. 16.
not to be depastured on Roads, 209.

Cattle Gates

not strictly a right of Common, 36.

Certiorari

Boundary Questions may be removed by, 142. 147.

Claim

Proceedings under General Enclosure Act, not remove-
able by, 282.
must be made in Writing, 76. 150.
to be deposited for Examination, 151.
Forms of, 303.
decision of contested, 138.

Classes

of Persons,
Allotments for, 194.
Meeting of to instruct Valuer, 197.

Coals

Prescription to dig for, 35.

Commissioners of Enclosure

under 8 & 9 Vict. c. 118.
appointment of, 89.
Salary of, 95.
to make declaration, 96.
may summon witnesses, 97.
may delegate powers, 102.
shall print and circulate forms, 117.
to direct preliminary meeting, 119.
to make provisional order, 122.
may specify allotments for exercise and recreation, 129.
and for labouring poor, 130.
to call meeting for appointment of Valuer, 132.
may alter or disallow instructions to Valuer, 135. 137.
may set out boundaries, 140.
may straighten boundaries, 148.

Commissioners of Enclosure — continued.

- not to determine titles, 154.
- may grant interests in Encroachments to Encroachers, 156.
74. 123.
- to hear appeals from Valuers' decisions, 160.
- may award Costs of contesting claims, 164.
- have no power to confirm invalid agreements, 69.
- may amend awards made under local acts, 70. 263.
- may amend and confirm awards improperly made under
Lord Worsley's act, 70. 263. 273.
- may revive powers under local Enclosure acts lost by lapse of
time or otherwise, 70. 269.
- to confirm Valuers' award, 214.
- may set out regulated pastures, 223.
- may apply provisions of General Enclosure Act to pastures
already stinted, 233.
- may remove Valuer, 240.
- to receive purchase moneys, 247.
- to convey lands sold for payment of expences of enclosure, 253.
- Form of Conveyance, 285.

Commissioners of Enclosure

under Local Acts.

power of, lost, may be revived by General Enclosure Com-
mission, 269.

except where dealings have taken place on the consideration
of such loss, 272.

Common.

of Estovers. See Estovers.

of Turbary. See Turbary.

Common. See Rights of Common.

of Pasture.

Appendant.

must have existed before the time of legal Me-
mory, 9.

to what Cattle confined, 9. 12.

limited to Cattle levant and couchant, 10.

originally confined to Arable Land, 13.

resembles Common of Vicinage, 14. 27.

Appurtenant.

created by grant, 15.

*Common**of Pasture**Appurtenant*—continued.

unlimited as to District or kinds of Cattle, 16.

Interpretation of Grants of, 16.

limited to a certain Number of Cattle, 17.

may be appurtenant to a Dwelling-house, &c. 17.

may be severed, 18.

limited to Cattle, levant and couchant, 20.

unlimited, a void Prescription, 20.

in gross.

by grant on prescription, 23.

for number certain, 23.

sans nombre, 23.

Inhabitants cannot prescribe for, 24.

who may prescribe for, 24.

subject to be rated, 116.

pur cause de Vicinage.

Wastes must be contiguous, 25.

must be mutual, 25.

must have existed before legal memory, 26.

does not extend to turning on Cattle, 26.

Wastes must not be divided, 26.

limitation of, 27.

resembles Common Appendant, 27.

*of Piscary, 7.**of Estovers, 7. 28.*

Right may be appendant, appurtenant, or in gross, 28.

of Turbary, 7. See Turbary.

in the soil, 8. See Soil.

Common Fields' Act,

remedy of defective proceedings under, 263.

Commonable Lands

a division of wastes, 85.

Lammas Lands, 40.

Lot Meadow, 41.

Shack Lands, 43.

Cultivation of, cannot defeat right of Commoner, 57.

how subject to be enclosed under stat. 8 & 9 Vict. c. 118. 105.

Commoner. See Landowner.

may not assist Cattle of Stranger, 12.

may not, by his own act, remedy an injury done by the Lord, 55.

is a Trespasser if he come upon the Common, except for the exercise of his right, 57.

where not answerable for damage, 57.

principle upon which Acts of usury may be tested, 58.

Common Lands

a division of wastes, 35.

manorial wastes, 36.

woodlands, 36.

stinted pastures, 36.

Sheep heaves, 37.

royal forests, 38.

how subject to be enclosed under stat. 8 & 9 Vict. cap. 118., 104.

Confirmation

of Valuer's award, how to be made, 214.

effect of, 214.

Consents

of one-third of Interest necessary to Application, 119.

of two-thirds necessary to Enclosure, 125.

how to be verified, 115.

of freemen and burgesses, 125.

of owners of separate tracts, 126.

of Lords of Manors, 127.

Consolidated Fund

Salaries and Expences to be paid out of, to be repaid to, 96.

Conveyance

of Land by Commissioners, form of, 285.

Coparceners

Allotments to, may be made in severalty, 198.

Copyholder

May take Estovers of common right, 30.

Evidence of title of, 99.

Copyholds

Allotments in respect of a Freehold, 265.

Corn

On Commonable lands uncut after harvest time, 57.

Cornwall

Duke of, who to represent, 112.

Corporation. See Burgesses.

May prescribe for Common, 24.

Costs. See Expences.

in appeals against boundary decisions, 145.

security for, 146. 243.

in contested claims, 153. 164.

of appeals against stoppage of ways, 171.

of partition of Allotment, 199.

Cottage

Common appendant to, 13.

Crown Lands

who to represent, 112.

Cultivated Land

to whom to be allotted, 190.

Custom

Distinction between custom and prescription, 29. 59.

must not be indefinite or uncertain, 35. 63.

or unreasonable, 60.

or contrary to the general law of the land, 64.

to grant in severalty, 61.

to do acts for preservation of Common, 62.

to take profit in alieno solo bad, 65.

except in case of Copyholders, 65.

D.

Dean

Forest of, exempted from operation of Enclosure Act, 106.

Declaration

to be made by Enclosure Commissioners, 96.

Witnesses to be examined upon, 101.

Form of, 101.

by Valuer, 138.

Distress

how made, 278.

Division

of Intermixed Lands, 259. 262, 263.

Documents

Power to Enclosure Commission to enforce production of, 99.

E.

Embankments

on the coast not to be made without consent of the Admiralty, 105.

Enclosure. See Appovement — Encroachment — Old Enclosure.

Extinguishment of right of Common by, 49.

by Agreement, 68. 274.

Commissioners no Power to confirm, 69.

by Act of Parliament, 69.

Lord Worsley's Act, 70.

Confirmation of invalid proceedings under, 70.

Course of proceedings to Enclose under act 8 & 9. Vic. c. 118.

by Encroachment, 73.

Act, 89 *et seq.*

limited to five years' duration, 95.

Expediency of, to be enquired into, by Enclosure Commissioners, 119.

Expences of such Enquiry not to be paid by Landowners unless Enclosures completed, 120.

Commissioners of. See Commissioners.

Encroachments

after 20 years, are deemed old Enclosures, 74.

do not give right to Allotment, 74.

property in, 75.

power to Commissioners to make equitable arrangements in respect of, 74. 123.

made within 20 years to be allotted under Enclosure Act, 155.

Commissioners may grant rights in respect of, 156.

made 20 years, to be deemed ancient Enclosures, 157.

not to carry right of Common, 157.

England and Wales

operation of General Enclosure Act confined to, 284.

Enjoyment

for Sixty years, constitutes a right, 158.

Estimate

of Expences, to be approved at Public Meeting of Persons interested, 237.

Estovers

definition of, 7. 28.

may be appendant or appurtenant, 29.

whether it can be in gross, 31.

Copyholders may take of Common right, 30.

must be taken from Underwood and Toppings, 30.

must be spent upon Premises, 31.

Evidence. See Witness.

in enquiries upon claims of Rights of Common, 76.

of user under provisions of Prescription Acts, 78.

to prove Custom, 79.

to prove Prescription, 79.

Reputation, 79.

Ancient Documents, 81. 85. 99.

Court Rolls, 99.

for Lord or owner of the soil, 84.

Exchanges

of Allotments, Valuer may award, 198.

of Lands, not subject to be enclosed, 257.

Notice of, 262.

Expences of, 263.

Exercise. See Allotment.*Expences*

of Enclosure.

to be paid from Consolidated Fund, 96.

how to be repaid, 24.

not to be repaid unless Enclosure completed, 120. 241.

Landowners may provide for in public meeting, 135.

of parties interested, 242.

of Witnesses, 102. 243.

of Valuer, 236.

of making and altering Roads, 172.

Expences — continued.

of regulated Pastures, 232.

of regulating Pastures already stinted, 235.

Remedies in non-payment of, 238.

Extinguishment of Rights of Common, 48.

F.

Feigned Issue

Court of Queen's Bench may direct, 148.

Action upon, may be brought by parties dissatisfied with decisions of Commissioners, 162.

Fences

of Allotments, 191.

of Roads, 171.

Field-reeves

election of, 227.

Duties of, 229.

Flockmaster, 25.*Forests*, 38.

of Dean and New Forest exempted from operation of Enclosure Act, 106.

Forms

of application for Enclosure Appropriation, 293.

for Exchange Appropriation, 298.

for division of intermixed Lands, 300.

for regulation of Pastures, 301.

of notice of meeting by appointment of Enclosure Commissioners, 301.

of Claim of Right of Pasture over Common Lands, 303.

over Commonable Lands, 303.

under Prescription Act, 305.

Free Fishery, 34.*Freemen*

Consent of, how to be obtained, 126.

Allotments for, 195.

G.

Garden Land

how to be allotted, 190

Gardens

to be let to poor Inhabitants, 218.

Rents of, how to be appropriated, 222.

recovery of, on non-payment of Rent, 220

General Sessional Act

to be deemed a Public general Act, 131.

Gravel

Prescription to dig for, 35.

See Ways.

Gross. See Common.*Growing Crops*

Compensation for, 176.

H.

Huy Bote, 7. 28.

House Bote, 7. 28.

Householders

Inhabitant, Allotment for, 194.

I.

Incapacitated Persons

who to represent in Enclosure Enquiries, 114.

Interpretation

of General Enclosure Act of 8 & 9 Vict., 283.

Inhabitant. See Towns — Householders.

may have common Appurtenant for a Number certain, 18.

cannot prescribe for Common in Gross, 24.

are capable of the Benefit of a Prescription, 35.

Consent of, how to be obtained, 125.

Instruction to Valuer, 133.

Interest. See Landowners — Lord of Manor.

J.

Joint Tenants

how to vote in Cases of Enclosure, 113.

Juror

Penalty for not attending, 144.

Jury

on Boundary Appeals, how to be chosen, 142.

to be subject to same Regulations as in Courts at Westminster, 142.

on Appeals against Stoppage of Public Ways, 170.

Justice in Eyre, 39.

K.

King

shall not have Common sans nombre, 25.

L.

Labouring Poor

Allotments for, 121. 183.

to be subject to Rent Charge, 130. 183.

Lammas Lands, 40.

Landowners. See Valuer.

who shall be deemed, for Purposes of Enclosure Act, 108.

Interests of, how to be estimated, 115.

Sale of Interest in Land to be enclosed during Enclosure Proceedings, 192.

Death of, Allotment to Representatives, 193.

Lands

Description of Lands subject to be enclosed under Act of 8 & 9 Viet. c. 118., 103.

in the neighbourhood of Towns, how to be dealt with, 107.

belonging to the Crown, who to represent, 112.

Power to enter for Surveys, 235.

Sale of, by Valuer, for Expences of Enclosure, 253.

Conveyances of, to be made by Commissioners, 253

Lands—continued.

Not subject to be enclosed.

Exchanges of, 257.

Division of, 259.

Leases

at rack Rent, may be avoided, 203.

Levant et Couchant

meaning of the Term, 10.

Limitation

Twenty Years' adverse Portion bars a Right of Common,
50.

clause, Stat. 2 & 3 W. 4. c. 71. p. 77. Appendix, 288.

clause of the General Enclosure Act, 78. 158.

Construction of this Clause, 78. 158.

of Actions against Commissioners, &c., under General Enclosure Act, 281.

Local Acts.

Revival of Powers under, 71. 267.

Remedy of Omissions in Awards under, 263.

Commissioners under. See Commissioners.

Trustees under, 276.

Lord of the Manor.

Rights of, 51.

of Approvement, 52. 68.

of building Windmills, &c., 53.

of Common for his own Cattle, 53. 64.

of digging for Ores, 55.

of breeding Game, 55.

controlled by Prescription, 55—67.

may be excluded from Common for a limited Period, 64.

may, with Consent of Commoners, regulate exercise of Common Right, 67.

may summon a Jury, and make Bye-Laws, 67.

Interest of, how to be estimated, 117.

Consent of, necessary to Enclosure, 127.

Allotment to, 186.

Lot Meadow, 41.

M.

Manorial waste, 36.

Maps

to be appended to Assistant Commissioners' report, 121.

of tithe commission may be adopted, 97. 134.

Valuer may pay for production or copies of, 154.

to be appended to Valuer's report, 211.

Meetings. See Commissioners—Assistant Commissioner—Valuer
—Estimate of Expences.

Money. See Purchase Money.

Mortgage

of allotments, 244.

Moss dales

Custom to hold in severalty when cleared of turves, 61.

Minerals

prescription to dig for, 35.

Assistant Commissioner to report as to, 121.

may be reserved to Lord, 187.

under stinted pastures, 206.

Rights to not compensated for by award, not to be affected
by enclosure, 208.

N.

Navigable Rivers

Right of Piscary cannot exist in, 34.

New Forest

exempted from operation of Enclosure Act, 106.

Newbury case, 21.

Notice

must be given by parties relying upon exceptions in Li-
mitation Acts, 87.

of preliminary Meeting, how to be given, 120.

of appointment of Valuer, 132.

of Enclosure Meetings, 149.

of stoppage of Turnpike Road, 169.

Notice — continued.

of Enclosure proceedings to be given to reversioners, 255.
of amendment of Awards under Local Act, 271.
general provision as to, 279.

O.

Old Enclosures.

may be allotted with consent, 193.

Orchards

to whom to be allotted, 190.

P.

Paley, Archdeacon

opinion of as to Rights of Common, 1.

*Pannage, 40.**Parson*

may prescribe for Common, 24.

Penalties

under Enclosure Act of 8 & 9 Vict. c. 118., how recovered,
277.

Piscary

where it may exist, 34.
how to be exercised, 34.
how limited, 34.

*Plan. See Map.**Plough-bots, 7. 28.**Poor Rate*

assessment to, 115.

*Possession. See Limitation.**Preliminary Meeting, 71.*

to be held on application of one third in value, 119.
notice of, 120.
form of, 302.

Prescription

for Common for all Cattle void, 20.
distinction between prescriptions and custom, 29. 59.

Prescription — continued.

to enclose, 62.

to do acts for preservation of the Common, 62.

to exclude the Lord for a limited period, 64.

Provisional Order, 71.

what particulars it shall specify, 122.

to be deposited, 124.

Public Interests

Assistant Commissioners to report upon, 121.

Public Purposes

allotment for, 179.

Purchase Money

Commissioners to receive, 248.

application of, 254.

surplus application of, 249. 251.

arising from sale of timber, application of, 248.

Purchasers

not liable for misapplication of purchase moneys, 254.

R.

Rates

of regulated Pastures.

Valuer to determine, 226.

Owners of Stints subject to, 227. 232.

Recreation

report as to allotments for, 121.

allotments for, 182.

Regulated Pastures

may be set out upon application of one half the interest, 223

Conversion into, to be deemed an Enclosure, 225.

Rule of rating to be established, 226.

property in soil of, 226.

Election of Field-reeves, 227.

power to Field-reeve to distrain, &c., 229.

may be increased or diminished by stint owners, 230

Expences of, 232.

Rent charge

on allotments for labouring poor, 183.

Reports

- to be made by Enclosure Commissioners, 92.
- to specify reasons for omission of allotments for recreation in certain cases, 129.
- upon applications to be made by Assistant Commissioners, 121.
- for recreation in certain cases, 129.
- Valuer's, 211.
- to be deposited, 212.

Reputation

- evidence of.
- where admissible in Enquiries as to Rights of Common, 81.

Reversioners

- Notice of Enclosure proceedings to be given to, 255.

Revival of Rights of Common, 50.*Rights of Common*. See *Common*.

- Origin of, 1.
- Appendant, 5.
- Appurtenant, 5.
- in Gross, 5.
- pur cause de vicinage, 6.
- Creation of, 45.
 - by custom, 45.
 - by grant, 45.
- alienation of, 45.
 - by deed, 46.
- extinguishment of
 - by unity of possession, 47.
 - by dissolution of Estate, 49.
 - by Enclosure, 49.
- revival of, 50.
- enjoyment of for 60 years, 158.
- power in Valuer to suspend, 174.

Roads.*Public*.

- Valuer may set out, 167.
 - or widen, 168.
 - or stop up, 168.
- subject to appeal, 169.

Roads— continued.

how to be fenced, 171.

Expences of making and altering, 172.

by whom to be repaired, 172.

Allotment for repair of, 177.

Private.

Valuer to set out, 173.

Royalties

not affected by Enclosure Act except with consent, 206.

Rushes

custom for Commoners, with right of fishery, to cut, 62.

S.

Sale

of interest in land to be enclosed during enclosure proceedings, 192.

Sand,

prescription to dig for, 35.

School-houses

not to be deemed encroachments, 157.

Sea Embankments

not to be made without consent of the Admiralty, 105.

Seal

of Enclosure Commissioners.

Instruments purporting to be sealed with, to be received in evidence, 92.

Secretary

to Enclosure Commissioners.

Appointment of, 94.

Salary of, 95.

Seignories

not affected by Enclosure Act, except with consent, 206.

Separate Pasture

validity of prescription for, 54.

Settlements,

not to be affected by Enclosure Act, 201.

Severalty Rights, 40. 105.*Shack*

definition of, 43.

Sheep-heaves, 37.

Shifting Severalties

origin of, 42.

Soil

common in.

Conditions of, 34.

Statute. See Act of Parliament.

Stinted

Pastures, 36. 223. 233.

Stints

owners of

to elect Field-reeves, 227.

may increase or diminish number of Stints on commons,
230.

Stones

prescription to dig, 35.

Stranger

Commoner may not agist the cattle of, 12.

Summons. See Assistant Commissioners.

form of, under Act of 8 & 9 Vict. c. 118. 286.

form of, 101.

service of, 101.

Supplemental Order

Allotments may be subdivided by, 216.

Survey. See Map.

Power to enter upon lands for, 235.

Surveyor

appointment of, 138.

Surcharge

whether long use of will create a right, 21.

T.

Tenure

of Allotments, 202.

Terrier

when admissible in evidence, 100.

Timber

sale of, 248.

Tithe Commission

documents of, may be used for purposes of Enclosure Commission, 97. 134.

Title

Commissioners not to determine, 154.

Toftowners

rights of to be allowed, 158.

Towns

Commons within certain distances of, how to be treated, 72. 106.

Commons in neighbourhood to have allotments set apart for recreation, 128.

Trees

standing on wastes to pass with allotment, 208.

Turbary.

Definition of, 7. 31.

may be appendant, appurtenant, or in gross, 31.

unlimited claims bad, 32.

Inhabitants cannot prescribe for, 35.

but may take benefit of prescription, 35.

Turnpike Road

Trustees of.

Consent of when necessary, 168.

V.

Valuer. See *Ways.*

general view of duties of, 72.

Appointment of, 131.

Instructions to, 133.

Alterations in by Commissioners, 137.

Agreement for payment of, 135.

Declaration by, 138.

to hold meetings, 149.

to hear and determine claims, 182.

may award costs, 153.

may pay expences of producing evidence before him, 154.

Powers of in respect of Watercourses and Ways, 166.

Valuer — continued.

- may suspend the exercise of rights of Common, 174.
- may direct course of husbandry, 175.
 - and Rules of stocking, 176.
- may exchange allotments, 199.
- may give power to enter upon allotments, 203.
- to draw up report, 211.
- to draw up award, 213.
- to allot the Stints in regulated pastures, 223.
- to sell lands for payment of expences of Enclosure, 253.
- Expences of, 236.
- Removal of, 240.
- incapacity of to purchase within seven years, 241.

Verderer, 38.*Veto*

- Lord of the Manor to have, 127.

Village Greens

- not to be enclosed, 107.
- may be exchanged for other land, 108.

U.

Unity of Possession

- acts as extinguishment of right of Common, 48.

Unlimited Right of Common

- Prescription for is void, 20.

User

- Illegal*, cannot become a right, 21.
 - unless under General Enclosure Act, 21.
- Acts of, principle by which they may be tested, 58.
- Proof of, 78. 81.

W.

Wastes. See Common Lands and Commonable Lands.

Watercourses

- Powers of Valuer as to, 166.

Ways

- Instructions to Valuer as to, 133.
- Powers of Valuer as to, 166.

174

258

3.

58.

ds

Stanford Law Library



3 6105 06 081 481 6